(13)

No. 92-602-CFX
Status: GRANTED

Title: St. Mary's Honor Center, et al., Petitioners
v.
Melvin Hicks

Docketed:
October 5, 1992

Court: United States Court of Appeals for
the Eighth Circuit

Counsel for petitioner: Gardner,Gary L.

Counsel for respondent: Oldham,Charles R.

Docket fee rcd 10-8-92.

Entry	Date	Note	Proceedings and Orders
1	Oct 5 1992	G	Petition for writ of certiorari filed.
3	Oct 20 1992		Order extending time to file response to petition until December 4, 1992.
4	Dec 3 1992		Brief of respondent Melvin Hicks in opposition filed.
5	Dec 9 1992		DISTRIBUTED. January 8, 1993
6	Jan 8 1993		Petition GRANTED. The brief of the petitioners must be received by the Clerk and served upon opposing counsel on or before 3 p. m., February 22, 1993. The brief of the respondent must be received by the Clerk and served upon opposing counsel on or before 3 p. m., March 24, 1993. A reply brief, if any, must be received by the Clerk and served upon opposing counsel on or before 3 p. m., April 12, 1993. Rule 29 does not apply. The case is set for oral argument during the Session beginning April 19, 1993.
			**********
7	Jan 29 1993	D	Motion of respondent for leave to proceed further herein in forma pauperis filed.
8	Feb 16 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Eighth Circuit.
9	Feb 17 1993		Record filed.
		*	Certified proceedings United States District Court for the Eastern District of Missouri (Box).
13	Feb 19 1993		Brief of petitioners St. Mary's Honor Center, et al. filed.
14	Feb 19 1993		Joint appendix filed.
16	Feb 19 1993		Brief amicus curiae of Equal Employment Advisory Council filed.
10	Feb 22 1993		Motion of respondent for leave to proceed further herein in forma pauperis DENIED.
11	Feb 22 1993		Brief amici curiae of Washington Legal Foundation, et al. filed.
12	Feb 22 1993		Brief amicus curiae of National Association of Manufacturers filed.
15	Feb 22 1993		Brief amicus curiae of Chamber of Commerce of the United States of America filed.
18	Mar 5 1993		CIRCULATED
19	Mar 5 1993		SET FOR ARGUMENT TUESDAY, APRIL 20, 1993. (2ND CASE).
24	Mar 5 1993	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for

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No. 92-602-CFX

Entry	Date	Note	Proceedings and Orders
			divided argument filed.
20	Mar 23 1993	X	Brief amici curiae of United States, et al. filed.
21	Mar 24 1993	X	Brief of respondent Melvin Hicks filed.
22	Mar 24 1993	X	Brief amici curiae of Lawyer's Committee for Civil Rights Under Law, et al. filed.
23	Mar 24 1993	X	Brief amicus curiae of National Employment Lawyers Association filed.
25	Apr 5 1993		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
26	Apr 20 1993		ARGUED.

Supreme Court, U.S.
FILED
OCT 5 1992
OFFICE OF THE CLERK

92-602

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER and STEVEN LONG,
Petitioners,

vs.

MELVIN HICKS,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a Title VII and 42 U.S.C. § 1983 action alleging unlawful discrimination, whether a judgment for the employee is compelled, as a matter of law, by a finding that the employer's legitimate, non-discriminatory reasons for adverse employment action are pretextual.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER and STEVEN LONG,
Petitioners,

vs.

MELVIN HICKS,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners, St. Mary's Honor Center and Steven Long, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 23, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported at *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992), and is reprinted in the appendix hereto at page A-1. The Order of the District Court and the Memorandum of the District Court is reported at *Hicks v. St. Mary's Honor Center*,

756 F. Supp. 1244 (E.D. Mo. 1991); the Order is reprinted in the appendix hereto at page A-13, and the Memorandum is reprinted in the appendix hereto at page A-14.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 2000e *et seq.* and 28 U.S.C. § 1343, the respondent brought this suit in the United States District Court for the Eastern District of Missouri. After trial to the court, the District Court entered judgments in favor of petitioners. See page A-13 herein.

On respondents' appeal, the Court of Appeals for the Eighth Circuit, on July 23, 1992, entered a judgment and opinion reversing the judgment of the District Court, directing the District Court to enter judgment in favor of respondent, and remanding the case for further findings on the remaining issues, including damages. See page A-12 herein. A timely petition for rehearing or rehearing *en banc* was filed on August 5, 1992, and was denied on September 3, 1992. See page A-31 herein.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent Melvin Hicks, a supervisory employee at St. Mary's Honor Center, an adult correctional institution of the Missouri Department of Corrections, brought a Title VII action against the Honor Center and a 42 U.S.C. § 1983 action against Steven Long, the Honor Center's Superintendent. Hicks alleged that his demotion and discharge were motivated by racial discrimination.

After a trial on the merits to the court, the District Court found that Hicks proved a *prima facie* case of racial discrimination by being a black man and a member of a protected class, meeting the

applicable job qualifications of a shift commander, being demoted and discharged, and his shift commander's position being filled by a white male. The District Court further found that the Honor Center and Long proved two legitimate, non-discriminatory reasons for Hicks' demotion and discharge, which were the severity and accumulation of violations of institutional rules over a short period of time. The District Court finally found that Hicks proved that the reasons adduced by the Honor Center and Long for Hicks' demotion and discharge were pretextual. First, Hicks was the only person disciplined for institutional rule violations actually committed by his subordinates. Second, though the chief of custody claimed that it was his policy to discipline the shift commander for his subordinates' rule violations, a white shift commander was not so disciplined. Third, white employees were not disciplined for committing more serious rule violations than Hicks committed. Fourth, the chief of custody "manufactured" the confrontation between himself and Hicks that led to Hicks' discharge. See pages A-22 through A-26 herein.

The District Court concluded that Hicks failed to prove his "ultimate burden," that his demotion and discharge were racially motivated. Hicks "need not prove racial motivation by direct evidence; instead, plaintiff may offer circumstantial evidence sufficient to create an inference of racial motivation." See page A-26 herein. While it was clear that Hicks was on "the express track to termination" and had proven "the existence of a crusade to terminate him," he had not proven that "the crusade was racially rather than personally motivated." See pages A-26, 27 herein. Hicks had not proven "by direct evidence or inference that his unfair treatment was motivated by his race." See page A-29 herein.

The District Court relied on the following evidence when it concluded that Hicks had not proven that his demotion and discharge were racially motivated. First, though Hicks proved

that he was disciplined more harshly than his co-employees, his black subordinates, who actually committed the institutional rule violations for which Hicks was disciplined, were not disciplined at all. Second, between January and December of 1984, though approximately twelve black persons and one white person were discharged from the Honor Center, Superintendent Long hired thirteen black persons; thirty black persons were employed at the Honor Center in January of 1984 and twenty-nine in December of that year. Third, the full-scale removal of employees from supervisory positions is often required when an institution is as poorly run as the Honor Center was. Before January of 1984, black persons held five of the six supervisory positions at the Honor Center. After January of 1984, two black persons and four white persons held supervisory positions, and if the black male to whom the chief of custody position initially had been offered had accepted the position, three white persons and three black persons would have held supervisory positions. Fourth, the disciplinary review board that reviewed Hicks' violation which led to his demotion was composed of two black and two white persons and recommended demotion. Fifth, Long was never aware of a study which warned that black persons possessed too much power at the Honor Center. See pages A-27 through A-28 herein.

The Court of Appeals concluded, however, that once the District Court found that Hicks had proven pretext, "[t]he record of the district court thus contain[ed] the necessary findings to compel a conclusion that plaintiff is entitled to judgment as a matter of law." See page A-12 herein.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DECISION THAT PROOF OF A *PRIMA FACIE* CASE AND PRETEXT COMPELS, AS A MATTER OF LAW, JUDGMENT FOR THE EMPLOYEE IS IN CONFLICT WITH THE FIRST AND SEVENTH CIRCUITS' DECISIONS ON THE SAME MATTER AND WITH APPLICABLE DECISIONS OF THIS COURT.

In the United States Court of Appeals for the Seventh Circuit, proof of a *prima facie* case and pretext does not compel judgment for the employee, but only supports such a judgment if one is returned by the trier of fact.

> If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind the rule of *McDonnell Douglas* [*Corp. v. Green*, 411 U.S. 792 (1973)]. It is important to understand, however, that the inference is not compelled. The trier of fact must decide after a trial whether to draw the inference. The lie may be concealing a reason that is shameful or stupid but not proscribed, in which event there is no liability.

Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990). *See also Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987). A trier of fact may infer a forbidden motivation for an adverse employment action from only the *prima facie* case and pretext.

> This is not a case where the plaintiff's only evidence of age discrimination is that he was replaced by a younger worker and that the stated grounds for firing him is spurious. That would be the kind of case that just barely survives the employer's motion for summary judgment: a case where

> the evidence of discrimination is entirely circumstantial, indirect.

Shager, supra, 913 F.2d at 402. *See also Pollard, supra,* 824 F.2d at 559.

Also in the United States Court of Appeals for the First Circuit, proof of a *prima face* case and pretext does not compel judgment for the employee, but only supports such a judgment if one is returned by the trier of fact.

> Even assuming the original prima facie case plus the evidence of pretext suffices to raise a reasonable inference of discrimination, this does not automatically entitle plaintiff to judgment. Provided a contrary inference (of nondiscrimination) might also be reasonably be drawn from the evidence, such showing only creates an issue of material fact for trial and, if discrimination is subsequently found, will support that finding.

Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991). *See also Villanueva v. Wellesley College,* 930 F.2d 124, 128 (1st Cir.), *cert. denied,* __ U.S. __, 112 S.Ct. 181, __ L.Ed.2d __ (1991).[1]

In this case there was evidence to support the inference that the employee's demotion and discharge were "personally motivated." The District Court concluded:

> The violation for which plaintiff was terminated involved plaintiff's making threats to Powell [the chief of custody]. Although the court does not condone the threatening of one's supervisor, the evidence suggests that Powell

[1] The First Circuit's recent opinion in *Fields v. Clark University,* 966 F.2d 49, 51-52 (1st Cir. 1992), does not compel judgment for the employee upon proof of a *prima facie* case and pretext. The opinion merely states that where the employee fails to prove pretext, he or she may still prove intentional discrimination by the *prima facie* case.

> manufactured the confrontation between plaintiff and himself in order to terminate plaintiff. After plaintiff was informed of his demotion, he was distressed and requested the day off. Steve Long granted the request. As plaintiff attempted to leave, Powell followed him and provoked him into behaving irrationally.

See page A-26 herein, footnote omitted. The District Court concluded that Hicks had not proven that "the crusade [to discharge him] was racially rather than personally motivated." See page A-27 herein.

The reason an inference of unlawful discrimination is not compelled by proof of a *prima facie* case and pretext is that a discredited legitimate, non-discriminatory reason for adverse employment action is not necessarily proof of intentional discrimination, but rather may be proof of some other motivation.

> Although the *prima facie* cases raise an inference of discrimination, the fact finder is not compelled to award victory to the plaintiff simply because the employer has not been candid about the real reason for the firing. . . . Even if the employer lies about the real reasons for the firing, other reasons, not impermissible under federal law, might be suggested by the evidence.

Veatch v. Northwestern Memorial Hospital, 730 F. Supp. 809, 819 (N.D. Ill. 1990). Possible reasons are a violation of a civil service system or collective bargaining agreement, personal or political favoritism, a grudge, random conduct, or error in the administrative of neutral rules. *Pollard, supra,* 824 F.2d at 559; *Benzies v. Illinois Department of Mental Health and Developmental Disabilities,* 810 F.2d 146, 148 (7th Cir.), *cert. denied,* 483 U.S. 1006 (1987). Another possible reason is, as the evidence suggested in this case, personal animosity.

The Court of Appeals for the Eighth Circuit's reasoning for its conclusion that judgment for the employee is compelled follows:

> Once plaintiff proved all of the defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law. Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.

See page A-10 herein.[2]

This reasoning is merely the application of the legally rebuttable mandatory inference arising from the employee's *prima facie* case to the employee's ultimate burden of intentional discrimination. The fallacy in this reasoning is that once the employer introduces evidence of a legitimate, non-discriminatory reason, even if it is untrue, the mandatory inference raised by the *prima facie* case is rebutted and "drops from the case." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254-256, 255 n. 10 (1981). The Eighth Circuit's decision, then, is in conflict with this Court's decision in *Burdine*. The Eighth Circuit's approach has been specifically rejected by the First Circuit.

> It was suggested at oral argument in this case that a mechanical application of the *McDonnell Douglas* framework was the correct one. Under that analysis, once a plaintiff has produced evidence of pretext, the employer's justification vanishes and the original *McDonnell Douglas* inference of discrimination rises again. . . . We reject that formalistic approach as not in keeping with either Supreme Court doctrine or common sense.

Villanueva, supra, 930 F.2d at 128.

"The *prima facie* case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.' " *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715 (1983), quoting *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978). The sensitive and difficult question facing triers of fact in discrimination cases is best resolved by focusing on the ultimate question of discrimination *vel non,* rather than the individual segments of the *McDonnell Douglas* allocation of burdens of proof. *Aikens, supra,* 460 U.S. at 714-716. The Eighth Circuit's decision, then, is in conflict with this Court's decision in *Aikens*.

Rejecting a formalistic application of the *McDonnell Douglas* allocation of burdens of proof, and believing that the evidence supported a motivation for Hicks' demotion and discharge more credible than those offered by either Hicks or the Honor Center and Long, the District Court properly concluded that Hicks had not proven intentional discrimination.

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[2]The Court of Appeals' characterization of the District Court's Memorandum as requiring the employee to "additionally prove by direct evidence or inference that the treatment was motivated by race..." (see page A-11 herein) is not supported by the District Court's Memorandum. The District Court did not adopt the "pretext-plus" approach to proof of racial motivation in discriminatory treatment cases. *See generally Williams v. Valentec Kisco, Inc.,* 964 F.2d 723, 728 (8th Cir. 1992).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1571

Melvin Hicks,
Appellant,

v.

St. Mary's Honor Center,
Division of Adult Institutions of the
Department of Corrections and Human Resources
of the State of Missouri; Steve Long,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: November 13, 1991
Filed: July 23, 1992

Before THEODORE McMILLIAN and JOHN R. GIBSON, Circuit Judges, and ELMO B. HUNTER,* Senior District Judge.

McMILLIAN, Circuit Judge.

Melvin Hicks ("plaintiff") appeals from a final judgment entered in the United States District Court for the Eastern District of Missouri, after a bench trial, in favor of St. Mary's Honor Center ("St. Mary's") and Steve Long (together "defendants") on the merits of his racial discrimination claim against St. Mary's under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. 2000e *et seq*., and his equal protection claim against Long

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*The Honorable Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri, sitting by designation.

under 42 U.S.C. § 1983.[1] *Hicks v. St. Mary's Honor Center*, No. 88-109C(5) (E.D. Mo. Jan. 31, 1991). On plaintiff's behalf, the Equal Employment Opportunity Commission ("EEOC") has appeared in this appeal as an amicus curiae. For reversal, plaintiff and the EEOC argue that the district court erred in holding that plaintiff failed to meet his burden of proving racial discrimination even though he had established a prima facie case of discrimination and had proven by a preponderance of the evidence that defendants' proffered nondiscriminatory reasons for demoting and terminating him were pretextual. For the reasons stated below, we reverse the judgment of the district court and remand the case with directions.

Facts

The following summarizes the facts as found by the district court. St. Mary's is a minimum security correctional facility operated by the Missouri Department of Corrections and Human Resources ("MDCHR"). Plaintiff, an African-American, was hired as a correctional officer at St. Mary's in August 1978. He was promoted to shift commander, a supervisory position, in February 1980.

Starting in 1983, MDCHR began investigating the administration of St. Mary's in response to complaints about poor maintenance, inadequate security, and other concerns at the facility. As a result, several persons at the upper levels of St. Mary's administration were demoted or terminated, and new people were hired. Among the changes that were made, defendant Long became the superintendent of St. Mary's. John Powell became the chief of custody and plaintiff's immediate supervisor. Long and Powell are both white.

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[1] A third claim brought by plaintiff against both St. Mary's and Long under 42 U.S.C. § 1981 was dismissed on the merits after the district court granted partial summary judgment in defendants' favor on December 7, 1989. The dismissal of that claim is not part of this appeal.

Prior to 1984, plaintiff had a satisfactory employment record. Plaintiff's supervisors had consistently rated his performance as competent. He had not been suspended, written up, or otherwise disciplined.[2] In early 1984, however, plaintiff became the subject of a series of disciplinary actions, based upon three separate incidents occurring in March of that year. The disciplinary actions led to his termination on June 7, 1984.

On March 3, 1984, while plaintiff was on duty as shift commander, two transportation officers observed a number of violations of institutional rules. One of the two transportation officers, Edward Ratliff, submitted a written report about these violations to Powell. A disciplinary review board met and recommended that plaintiff be suspended for five days. Plaintiff was given the five-day suspension. Other officers who were also responsible for the violations were not disciplined. Powell testified that it was his policy to discipline only the shift commander for violations which occur during a shift. Slip op. at 4.

On March 19, 1984, plaintiff gave two correctional officers permission to use a St. Mary's vehicle. Neither the correctional officers nor the control center officer on duty at the time logged the use of the car, despite an institutional rule requiring such logging. Powell sought disciplinary action against plaintiff. A disciplinary review board met on April 6, 1984, and voted to recommend that plaintiff be demoted for failing to insure that the use of the car was logged. Powell, who was on the disciplinary board, voted to terminate plaintiff. Plaintiff was demoted to correctional officer I. Neither the control officers who borrowed the car, nor the control officer on duty, was disciplined. *Id.* at 4-5.

On March 21, 1984, while plaintiff was still a shift commander, two inmates were involved in a brawl. One of the two

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[2] Once, in 1980, plaintiff was mistakenly written up as absent without notice. He was on vacation at the time. Slip op. at 3 n.4.

inmates was injured and required emergency medical treatment. After learning that the inmate had been injured in a fight, plaintiff drafted a memorandum to Powell notifying him of the fight and the inmate's injury. Plaintiff ordered the correctional officer who had escorted the injured inmate to the hospital to write a report on the incident. On March 24, 1984, Powell submitted a report to Long charging plaintiff with failure to investigate the assault. On March 29, 1984, Powell gave plaintiff a letter of reprimand, citing failure to investigate the assault as the violation. *Id.* at 5-6.

On April 19, 1984, plaintiff was notified of his demotion during a meeting with Long, Powell, and Vincent Banks, the assistant superintendent. After hearing the news, plaintiff requested and was granted the day off. As plaintiff was leaving, Powell followed him and ordered him to open his locker so Powell could take plaintiff's shift commander manual. Plaintiff refused and the two men exchanged heated words. Plaintiff then indicated that he would "step outside" with Powell.[3] Powell warned him that his words could be perceived as a threat. Plaintiff then left. Powell sought disciplinary action on grounds that plaintiff had threatened him. A disciplinary board was convened and recommended a three-day suspension. Long disregarded their vote and instead recommended termination; he testified that this recommendation was based upon the accumulation and severity of plaintiff's violations. On June 7, 1984, plaintiff was terminated. *Id.* at 6-7.

By contrast, when plaintiff filed a report in April 1984 recommending that correctional officer Arthur Turney be disciplined for insubordination to a supervisor, after Turney cursed plaintiff with highly profane language because of a poor service rating, no disciplinary action was taken against Turney. Powell

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[3] The district court concluded that "Powell followed [plaintiff] and provoked him into behaving irrationally." Slip Op. at 16.

concluded that Turney was "merely venting justifiable frustration." *Id.* at 9, 16 n.17.[4]

During this same period from January through June 1984, plaintiff reported violations of institutional rules on numerous occasions but his reports were generally ignored. For example, plaintiff reported to Powell an incident in which transportation officer Ratliff allowed his brother to bring a gun into the correctional facility without checking it at the front desk, despite specific instructions from plaintiff that the gun should be checked. Powell took no disciplinary action. Plaintiff later notified Powell of an incident in which Ratliff instructed an inmate to climb over a wall into Steve Long's locked office so Ratliff could obtain some inmate work passes that were inside. Despite the security breach, Powell did not seek discipline of Ratliff.[5] On two occasions in March, plaintiff arrived at work to find the front desk unattended. Apparently both times the shift commander on duty was aware of the front desk officer's absence and had ordered the control center officer to open and close the front door. Plaintiff reported these violations but nobody — including the shift commander, Sharon Hefele — was disciplined. Nor was Hefele disciplined when, on another occasion, plaintiff reported that he found two doors that were supposed to be locked at all times left open under her command. Plaintiff also reported an incident in April 1984 in which a correctional officer, John Newland, took a set of St. Mary's keys home with him; no discipline followed. Another incident occurred in April 1984 in which an inmate escaped due to a correctional officer's admitted negligence. The officer, Michael Doss, received only a letter of reprimand. *Id.* at 7-9.

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[4] The district court observed "Powell, however, was considerably more sensitive as the victim of insubordination." Slip op. at 16 n.17.

[5] According to the district court, Powell actually praised Ratliff for his quick thinking in "diffusing a volatile situation." Slip op. at 8 n.10.

Turney, Ratliff, Hefele, Newland, and Doss are all white. *Id.* at 3 n.3, 7 n.8, 8 n.12, 9 nn.13 & 14.

During the period from December 1983 to December 1984, approximately twelve blacks and one white were fired at St. Mary's. During this period, the number of blacks hired at St. Mary's was approximately the same as the number of blacks fired. Slip op. at 9.[6]

Discussion

Plaintiff's Title VII claim against St. Mary's and his § 1983 claim against Long were jointly tried by the district court after plaintiff waived his right to a jury trial on the § 1983 claim. In its memorandum opinion, the district court addressed the Title VII claim first and then disposed of the § 1983 claim under the same analysis, reasoning that "the elements of the cause of action are the same under both [Title VII and § 1983]." Slip op. at 21. We agree with the district court that the elements of plaintiff's discrimination claim against Long are the same as those which he must prove against St. Mary's under Title VII. *See Richmond v. Board of Regents*, 957 F.2d 595, 598 (8th Cir. 1992) (burden of showing prima facie case of discrimination is the same under

[6] The district court's findings do not, however, specify the levels of position at which these black individuals were hired and fired. Nor did the district court make relative comparisons of the treatment of blacks versus whites at specific positions. According to plaintiff, of the ten white employees who were on the custody roster at St. Mary's as of April 1984, five were promoted. Plaintiff additionally contends that the breakdown of blacks hired and fired demonstrates discrimination against blacks in *supervisory* positions. Plaintiff also introduced evidence at trial of a study performed in 1980 and 1981 of two honor centers in St. Louis and Kansas City. According to the district court's findings, this study concluded that "too many blacks were in positions of power at St. Mary's, and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real." However, none of the witnesses for the defense admitted to being aware of the study at the time of the 1984 personnel changes at St. Mary's. Slip op. at 10.

Title VII, § 1981, § 1983, or the Age Discrimination in Employment Act (ADEA)); *Briggs v. Anderson*, 796 F.2d 1009, 1021 (8th Cir. 1986) (*Briggs*) (inquiry into intentional discrimination for individual actions brought under §§ 1981 and 1983 is essentially the same as inquiry under Title VII); *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 468 n.5 (8th Cir. 1984) (*Craik*) (issue of discriminatory intent is common to analyses under Fourteenth Amendment, § 1983, and Title VII).

It is undisputed that Long was personally involved in demoting and terminating plaintiff and that his acts were causally connected to plaintiff's demotion and termination. Slip op. at 20 ("Steve Long recommended the demotion and termination of plaintiff in his capacity as superintendent of a state correctional facility.") Moreover, St. Mary's and Long were jointly represented at trial, and they relied on the same evidence in defending the discrimination claims against them. Thus, under the circumstances of this case, to the extent plaintiff prevails on his Title VII claim against St. Mary's, he is equally entitled to relief against Long under § 1983. *See Irby v. Sullivan*, 737 F.2d 1418, 1425 (5th Cir. 1984) (individual may be held personally liable under § 1983 if he or she was personally involved in the unconstitutional conduct or there was a causal connection between the individual's acts and the constitutional violation). Accordingly, we confine our discussion to the common issue of whether plaintiff proved a Title VII violation on grounds that defendants intentionally discriminated against him on the basis of race. *See Briggs*, 796 F.2d at 1021 (confining discussion of Title VII and § 1983 claims to Title VII analysis because issue of discriminatory intent is common to both); *Craik*, 731 F.2d at 468 n.5 (same).

Because plaintiff's Title VII claim was based upon a disparate treatment theory, the district court analyzed this claim under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (*McDonnell Douglas*), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (*Burdine*).

The *McDonnell Douglas-Burdine* disparate treatment analysis proceeds in three stages. First, the plaintiff has the initial burden of establishing a prima facie case of disparate treatment, thus creating an inference of discrimination. *Burdine*, 450 U.S. at 253-54 & n.6. In the present case, the district court found that "[p]laintiff proved a prima facie case of race discrimination." Slip op. at 12.[7]

Next, the defendant may rebut the presumption by articulating a legitimate, nondiscriminatory reason or reasons for the adverse employment action. "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55. The district court found that defendants had "set forth essentially two reasons for the adverse employment actions: the severity and the accumulation of violations committed by plaintiff." Slip op. at 12.[8]

At the final stage, the plaintiff is given the opportunity to prove that the defendant's stated reasons were not the true reasons — and therefore are a mere pretext — for the adverse employment action.

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256. At this stage of the analysis in the present case, the district court held "[p]laintiff has proven that the reasons proffered by defendant are pretextual." Slip op. at 13. Indeed, the district court outlined the evidence for some three pages before again stating that "[p]laintiff has carried his burden in proving that the reasons given for his demotion and termination were pretextual." *Id.* at 16. The district court considered the facts that plaintiff was "mysteriously" the only one disciplined for violations actually committed by his subordinates; that the alleged policy of disciplining only the shift commander for violations occurring during a shift was only applied to plaintiff's shifts; and that, on numerous occasions, plaintiff was singled out for unusually harsh disciplinary treatment while others who committed more serious violations either were not disciplined or were treated more leniently. *Id.* at 13-16. Yet a third time, the district court summed up and made clear that plaintiff had succeeded in proving the violations were pretextual reasons for his demotion and discharge. *Id.* at 19.

The district court, however, went on to state:

> [A]lthough plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated. . . . [P]laintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge. Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race.

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[7] Plaintiff's prima facie case was based upon the facts that plaintiff was black and therefore a member of a protected class; he was qualified for the position of shift commander; he was demoted from shift commander to correctional officer, and then was terminated; and his position remained open and was presently filled by a white male. Slip op. at 12. *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth elements of a typical prima facie case).

[8] Long testified that his recommendation to terminate plaintiff was based upon the severity and accumulation of plaintiff's violations. Slip op. at 7.

Id. at 17, 19. We hold that, by reaching this ultimate conclusion, the district court erred in its analysis.

First, it was improper for the district court to assume — without evidence to support the assumption — that defendants' actions were somehow "personally motivated." As the district court noted, defendants articulated only two legitimate, nondiscriminatory reasons for their actions (the severity and the accumulation of violations), and both were discredited by plaintiff as pretextual. While we question whether such a hypothetical reason based upon *personal* motivation even could be stated and still be "legitimate" and "nondiscriminatory," we need not address that question because defendants simply never stated that personal motivation was a reason for their actions or offered evidence to substantiate such a claim. In order to satisfy its burden at the second stage of the *McDonnell Douglas-Burdine* analysis, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 255.

Once plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law. Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for [the adverse employment action] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based [its] decision on an impermissible consideration such as race.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (citation omitted); *see Burdine*, 450 U.S. at 256.

In this circuit, if the plaintiff has met his or her burden of proof at the pretext stage — that is, if the plaintiff has proven by a preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action — then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required. *See Williams v. Valentec Kisco. Inc.*, No. 90-2909 at 7-8 (8th Cir. Apr. 29, 1992) (rejecting the so-called "pretext-plus" approach); *Adams v. Nolan*, No. 91-1489 at 89 & n.7 (8th Cir. Apr. 23, 1992) (same); *Brooks v. Monroe Systems for Business Inc.*, 873 F.2d 202, 204 (8th Cir.) (under ADEA, submission of discredited reason for adverse employment action is itself evidence of discriminatory motive), *cert. denied*, 493 U.S. 853 (1989); *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988) (under ADEA, rejecting the argument that "even if [the defendant's] proffered reasons for firing [the plaintiff] were not its true reasons, [the plaintiff] must still prove intentional discrimination, instead of merely discrediting [the defendant's] defense").

In the present case, the district court made an unequivocal factual finding that plaintiff had satisfied his burden of proving that the reasons articulated by defendants for his demotion and discharge were pretextual. The only reason given by the district court for failing to enter judgment based on this finding of pretext was the requirement that plaintiff additionally prove by direct evidence or inference that the treatment was motivated by race,

which we have found contrary to the law. The record of the district court thus contains the necessary findings to compel a conclusion that plaintiff is entitled to judgment as a matter of law. The numerous cases of the Supreme Court, including *McDonnell Douglas, Burdine,* and *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711 (1983), as well as our decisions which have followed them, make clear that plaintiff may succeed by proving pretext. The district court found that he had done so. Plaintiff is therefore entitled to recover.

Accordingly, we reverse the judgment of the district court on the merits of plaintiff's Title VII claim against St. Mary's and his § 1983 claim against Long.[9] The district court shall enter judgment for plaintiff accordingly. We remand the case to the district court for further findings on the remaining issues, including damages.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[9] Having reversed the district court on the basis of plaintiff's disparate treatment theory, we need not reach the question of whether the district court erred in failing to address plaintiff's alternative theory of retaliatory discharge as a separate basis for Title VII liability.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-109 C (5)

MELVIN HICKS,
Plaintiff,

vs.

ST. MARY'S HONOR CENTER, and STEVE LONG,
Defendants.

ORDER

[Filed: January 31, 1991]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that judgment is entered in favor of defendant St. Mary's Correctional Center and against plaintiff on the merits of Count I of plaintiff's complaint.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant Steve Long and against plaintiff on the merits of Count III of plaintiff's complaint.

Dated this 31st day of January, 1991.

/s/ Stephen Limbaugh
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-109 C (5)

MELVIN HICKS,
Plaintiff,

vs.

ST. MARY'S HONOR CENTER, et al.,
Defendants.

MEMORANDUM

Plaintiff filed a three-count complaint against defendant St. Mary's Honor Center ("St. Mary's") and defendant Steve Long. Defendant St. Mary's is a minimum security correctional facility operated by the Missouri Department of Corrections and Human Resources ("MDCHR"). Defendant Steve Long was the superintendent of St. Mary's from January 7, 1984 to May 16, 1985. In Count I plaintiff alleges that St. Mary's violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*. by demoting and then terminating plaintiff because of his race. In Count II plaintiff alleges that St. Mary's and Steve Long violated 42 U.S.C. § 1981. On December 7, 1989 the Court entered summary judgment in favor of defendants and against plaintiff on the merits of Count II. In Count III plaintiff alleges that Steve Long violated 42 U.S.C. § 1983 by demoting and then terminating plaintiff because of his race.

The case was tried before the court on June 5, June 6, and June 14, 1990. The Court, having considered the pleadings, the testimony of the witnesses, and the documents in evidence, hereby makes the following findings of fact and conclusions of law as required by Fed.R.Civ.P. 52.

A. Findings of Fact

Plaintiff began working at St. Mary's in August, 1978 as a correctional officer I. Plaintiff was promoted to shift commander in February, 1980. In late 1983 Arthur Schulte was superintendent at St. Mary's, and Vincent Banks was assistant superintendent. Gilbert Greenlee was chief of custody. Plaintiff and Carl MacAvoy were shift commanders; Charles Woodard served as an acting shift commander.[1]

In 1983, George Lombardi, the assistant director of the Division of Adult Institutions of MDCHR, received numerous complaints from inmates, former inmates, staff, legislators and other citizens concerning conditions at St. Mary's. Lombardi placed an undercover investigator at St. Mary's to observe how the institution was being run. Lombardi also made a series of unannounced visits and found a poorly maintained institution with substandard upkeep, inadequate security measures, and no effective rules or regulations. Lombardi instructed Schulte to improve conditions, but Schulte failed. In January, 1984 Lombardi demoted and transferred Schulte to another correctional institution. Schulte was replaced by Steve Long. Other personnel changes at St. Mary's were also made. Gilbert Greenlee was demoted and transferred. Carl MacAvoy and Charles Woodard were terminated. John Powell, replaced Greenlee as chief of custody.[2] Sharon Hefele replaced Charles Woodard as a shift commander; J.R. Wilson replaced Carl MacAvoy as a shift commander.[3] After the personnel changes, Lombardi found remarkable improvements in the manner that St. Mary's was run.

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[1] Arthur Schulte is white. Plaintiff, Vincent Banks, Gilbert Greenlee, Carl MacAvoy and Charles Woodard are black.

[2] The position of chief of custody was initially offered to a black male who refused the position.

[3] John Powell, Sharon Hefele, and J.R. Wilson are white.

Prior to January, 1984 plaintiff had a satisfactory employment record. Plaintiff's supervisors consistently rated plaintiff's performance as competent, and plaintiff was not suspended, written up, or otherwise disciplined.[4] Plaintiff, however, became subject to frequent discipline after he was placed under the supervision of John Powell.

On March 3, 1984 plaintiff was the shift commander on the first shift. Plaintiff's hours on duty were 11:30 p.m. to 7:30 a.m. During plaintiff's shift Edward Ratliff and Frank Slinkard, transportation officers at St. Mary's, arrived to pick up inmates who were scheduled to work that day at jobs outside St. Mary's. When Ratliff and Slinkard attempted to enter St. Mary's, they found that there was no officer present at the front door.[5] Elvis Thomas, the control center officer, momentarily left his assigned post to open the front door. After Ratliff and Slinkard entered St. Mary's, they noticed that the first floor lights were off. Plaintiff, who was performing a perimeter check of the premises, and correctional officer Charles Kennedy were not present when Ratliff and Slinkard entered St. Mary's.

Ratliff wrote an incident report to John Powell concerning the violations of institutional rules he observed during his March 3, 1984 visit to St. Mary's. The violations brought to Powell's attention included (1) the front door officer being away from his position, (2) the control center officer leaving his post to open the front door, (3) the absence of Charles Kennedy, and (4) the lights being off on the first floor. A four-person disciplinary review board, composed of two whites and two blacks, met and recommended that plaintiff be given a five-day suspension.[6] In accordance with the disciplinary review board's recommendation, plaintiff was suspended for five days. Treglown was not disciplined for being away from his post. Thomas was not disciplined for leaving his post. Kennedy was not disciplined for being absent for a substantial period of time. Powell testified that it is his policy to discipline only the shift commander for violations which occur during his shift.

[4] In 1980 plaintiff was written up for being absent without notice. Plaintiff, however, was on vacation at the time.

[5] Ratliff and Slinkard later found Don Treglown, the front door officer, balancing his checkbook in the break room.

On March 19, 1984 Don Moore, a correctional officer, was ordered during his first shift to work a double shift. Moore had driven a borrowed automobile to work that day, and had to return it to a friend at the end of his first shift. Moore asked plaintiff if another correctional officer could follow Moore to his friend's house in a St. Mary's vehicle, and then drive Moore back to St. Mary's. Plaintiff ordered correctional officer Jimmie Davis to follow Moore in a St. Mary's vehicle. Institutional rules require that each use of a St. Mary's vehicle be entered into a log. Neither Don Moore, Jimmie Davis, nor the control center officer entered into the log book the use of the St. Mary's vehicle.

Powell recommended that plaintiff be disciplined for failing to log the use of the St. Mary's vehicle. On April 6, 1984 a four-person disciplinary review board, composed of two blacks and two whites, convened and voted to recommend the demotion of plaintiff.[7] In accordance with the disciplinary review board's recommendation, plaintiff was demoted from shift commander to correctional officer I. Plaintiff was not disciplined for authorizing the use of the vehicle, but instead for failing to insure it was

[6] The disciplinary review board makes a recommendation to the superintendent. The superintendent, in turn, makes a recommendation to the Director of MDCHR. The Director of MDCHR makes the ultimate decision concerning discipline.

[7] John Powell, a member of the disciplinary board, voted to terminate plaintiff for the infraction.

logged. Neither Moore, Davis, nor the control center officer were disciplined for failing to log the use of the vehicle.

On March 21, 1984 two inmates were involved in a brawl in which one, Mark Valenti, was injured and received emergency medical treatment. After the brawl Valenti told plaintiff that he injured himself lifting weights. On the way to the hospital Valenti admitted to correctional officer William Garrett that he was punched in the chest by inmate Allen Johnson. On March 21, 1984 plaintiff drafted a memorandum to John Powell informing him that there was a fight between Valenti and Johnson and Valenti was injured. Plaintiff ordered Garrett to submit a report.

On March 24, 1984 Powell submitted a report to Steve Long in which he charged plaintiff with a failure to investigate the assault. Powell stated: "Although the medical out count was logged, and a memorandum was submitted on this matter, NO ACION [sic] was taken by the Shift Commander in investigating the seriousness of the assault or the after effects on the residents involved." On March 29, 1984 Powell gave plaintiff a letter of reprimand for failing to investigate the incident.

On April 19, 1984 plaintiff was notified of his demotion during a meeting with Steve Long, Vincent Banks, and John Powell. Plaintiff was shaken by the news, and requested the rest of the day off. Steve Long granted plaintiff's request. As plaintiff attempted to exit Powell followed him and ordered plaintiff to open his locker so Powell could obtain the shift commander's manual. Plaintiff refused, and the two exchanged heated words. Plaintiff indicated he would "step outside" with Powell, and Powell warned plaintiff that his words could be perceived as a threat. After several tense minutes, plaintiff left.

Powell sought disciplinary action against plaintiff for the "threats" plaintiff made against him during the April 19, 1984 confrontation. On May 9, 1984 a four-person disciplinary board, composed of at least two blacks, convened and voted to suspend

plaintiff for three days. Steve Long, however, disregarded their vote and recommended termination. Long testified that he based his decision on the severity and accumulation of plaintiff's violations. On June 7, 1984 plaintiff was terminated.

During the period from January 1984 to June 1984, plaintiff brought numerous violations of institutional rules by co-workers to the attention of his superiors. On February 4, 1984, while plaintiff was shift commander, Ratliff entered St. Mary's with his brother, a deputy marshal.[8] Ratliff's brother asked whether he should check his gun. Although plaintiff stated that the gun should be checked, Ratliff informed his brother that he need not check his gun while inside St. Mary's. Plaintiff reported the incident to Powell. Powell's position was that squabbles between a shift commander and his subordinates should be handled without the intervention of the chief of custody. Ratliff was not disciplined for disobeying his supervisor.

During Ratliff's visit to St. Mary's on March 3, 1984 to pick up inmates, he discovered that the inmates' work passes were locked inside Steve Long's office. To obtain the work passes Ratliff instructed an inmate to climb over the wall into Steve Long's office and unlock the door.[9] Plaintiff brought this incident to the attention of Powell. Ratliff was not disciplined for permitting an unescorted inmate access to Steve Long's office.[10]

On March 8, 1984 plaintiff reported for work and noted that there was no officer stationed at the front door. On March 13, 1984 plaintiff again arrived at work and noted the front door

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[8] Ed Ratliff is white.

[9] There is a conflict in the evidence whether the inmate climbed over the wall or squeezed through an opening in the wall.

[10] Inmates apparently become irritable when they are unable to obtain their work passes. Rather than discipline Ratliff for an apparent serious breach of security, John Powell lauded Ed Ratliff for "diffusing a volatile situation."

officer was absent. Plaintiff inquired about the absence of the front door officer. Don Smith, the control center officer, said that shift commander Sharon Hefele ordered him to open and close the front door.[11] On March 13, 1984 and March 14, 1984 plaintiff reported these incidents. No one was disciplined for the violations.

On April 12, 1984 correctional officer Michael Doss was the acting shift commander of the third shift.[12] Doss was ordered to remove inmate Theodore Hammond from a detention cell and transport him to the City Jail immediately. Doss was sluggish in carrying out these orders and the inmate escaped. Doss admitted that he was negligent in the performance of his duties, and that his negligence was a cause of the escape. Doss, however, received only a letter of reprimand as discipline.

On April 4, 1984 plaintiff reported that correctional officer John Newland took a set of St. Mary's keys home with him.[13] After Newland was contacted by the control center officer, he returned the keys and stated that he forgot the keys were in his pocket. Newland was not disciplined for the violation.

On April 7, 1984 plaintiff reported that during the shift of Sharon Hefele the doors to the main power room and the annex building, which are always supposed to be locked, were left open. Sharon Hefele was not disciplined for the violation.

On April 9, 1984 plaintiff met with correctional officer Arthur Turney to discuss Turney's service rating.[14] Turney, who was unsatisfied with his rating score, became indignant and cursed plaintiff with highly profane language. On April 17, 1984

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[11] Don Smith is black.

[12] Michael Doss is white.

[13] Tom Newland is white.

[14] Arthur Turney is white.

plaintiff filed a report recommending that Turney be disciplined for insubordination to a supervisor. After speaking with Turney, Powell concluded that Turney was merely venting justifiable frustration, and did not discipline Turney for the incident.

As was stated, *supra*, numerous personnel changes occurred at St. Mary's in 1984. In the period from December, 1983 to December, 1984 approximately twelve black employees were terminated. Only one white employee was terminated. During the course of 1984 Steve Long hired approximately the same number of blacks that were terminated. In January, 1984 thirty blacks were employed at St. Mary's. In December, 1984 twenty nine blacks were employed at St. Mary's.

In 1980 and 1981 James Davis performed a study of the honor centers in St. Louis and Kansas City. The Davis study is a comprehensive comparison of the two institutions which discussed the shortfalls and suggested means of improvement. In a section toward the end of the study Davis pointed out that too many blacks were in positions of power at St. Mary's, and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real. No witness for the defendants admitted he was aware of the Davis study at the time of the 1984 personnel changes.

II. CONCLUSIONS OF LAW

A. Count I – Title VII

In Count I plaintiff alleges that St. Mary's violated Title VII by demoting and then terminating plaintiff because of his race. Under Title VII it is an unlawful employment practice for an employer to "discharge any individual or otherwise to discriminate against any individual with respect to his . . . terms, conditions or privileges of employment because of such individual's race. . . ." 42 U.S.C. 2000e-2(a)(1). There are basically two types of actions under Title VII: disparate treat-

ment and disparate impact. Disparate treatment occurs when an employer treats some people less favorably than others because of their race, color, religion, sex or national origin. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). The plaintiff in a "disparate treatment" case is required to prove that the defendant had a discriminatory intent or motive.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) the Supreme Court set forth the basic allocation of proof in a Title VII case alleging discriminatory treatment. The plaintiff must first prove a prima facie case of race discrimination by a preponderance of the evidence. *Id.* at 802, 93 S.Ct. at 1824. Plaintiff may establish a prima facie case by showing that (1) he was within the protected class, (2) he met applicable job qualifications, (3) despite these qualifications, he suffered adverse employment action, and (4) after the adverse employment action the position remained open and the employer continued to seek applications from persons with similar qualifications. *Id.* If the plaintiff succeeds, then defendant must show a legitimate, non-discriminatory reason for the adverse employment action. *Id.* Finally, if the defendant succeeds, plaintiff must prove by a preponderance of the evidence that the reasons given by the defendant for the challenged employment action were pretextual. *Id.* at 804, 93 S.Ct. at 1825. "Despite these shifting burdens, the plaintiff retains throughout the case the ultimate burden of persuading the trier of fact that the employer discriminated against him [due to his race]." *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269, 1272-73 (8th Cir. 1990) (*citing Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94, 67 L.Ed. 2d 207 (1981)).

Plaintiff proved a prima facie case of race discrimination. First, plaintiff, who is black, is a member of a protected class. Second, plaintiff met the applicable job qualifications of a shift commander. At the time of his termination plaintiff had served

as shift commander for approximately four years. Plaintiff maintained a satisfactory employment record until John Powell became chief of custody at St. Mary's. Until 1984 plaintiff was consistently rated as competent by his supervisors and had not been disciplined for misconduct or a dereliction of duty.

Third, plaintiff suffered adverse employment action when he was demoted from shift commander to correctional officer I in April, 1984 and terminated in June, 1984. Fourth, after plaintiff's demotion his position as shift commander remained open and was presently filled by a white male.

Because plaintiff succeeded in proving a prima facie case, defendant must set forth a legitimate, non-discriminatory reason for the adverse employment actions. Defendant has set forth essentially two reasons for the adverse employment actions: the severity and the accumulation of violations committed by plaintiff. Defendant asserts that the nature of plaintiff's violations were sufficiently severe to justify the discipline received. On March 3, 1984 plaintiff failed to adequately supervise the employees on his shift. The unsupervised employees abandoned their posts and left St. Mary's vulnerable to escape or knavery by the inmates. Violations of internal policy, such as this, which lead to breaches of security in a correctional institution are grounds for disciplining the employee responsible. Defendant also considered the numerous violations committed by plaintiff in a short period of time. The excessive accumulation of violations over a short period of time is a legitimate reason for increasing the severity of discipline with each violation committed.

Because defendant has succeeded in setting forth a legitimate, non-discriminatory reason for the adverse employment action, plaintiff must prove that the reasons given by defendant are pretextual. Pretext is a statement that does not describe the actual reasons for the decision. *Mister v. Illinois C. G. R. Co.*, 832 F.2d 1427, 1435 (7th Cir. 1987). Plaintiff has proven that the reasons proffered by defendant are pretextual. First, plaintiff was myste-

riously the only person disciplined for violations actually committed by his subordinates. Plaintiff was given a five day suspension for the violations committed on March 3, 1984: (1) the front door officer being away from his position, (2) the control center officer leaving his post, (3) a correctional officer being absent, and (4) the lights on first floor being off. Don Treglown, the front door officer who was discovered balancing his check book in the break room, was not disciplined in any way. Elvis Thomas, the control center officer who left his post to open the front door, was not disciplined in any way. Charles Kennedy, the correctional officer absent for a substantial period of time, was not disciplined in any way.

Plaintiff was demoted for failing to log the use of a St. Mary's vehicle. The control center officer, who maintains the log book, was not disciplined in any way. Correctional officer Don Moore, who formally apologized for forgetting to log the use of the vehicle, was not disciplined in any way. Jimmie Davis, who drove the vehicle, was not disciplined in any way.

John Powell testified that it was his policy to discipline only the shift commander for violations which occurred on the commander's shift. Although the Court will not comment on the prudence of such a policy, plaintiff demonstrated such a policy only applied to violations which occurred on plaintiff's shift.

On April 7, 1984 plaintiff reported that during the shift of Sharon Hefele the doors to the main power room and the annex building were left open. Sharon Hefele, the shift commander, was not disciplined for the violation of a subordinate on her shift. On March 13 and March 14, 1984 plaintiff reported that twice during the shift of Sharon Hefele no front door officer was present.[15] The control center officer had to leave his post in order

[15] The control center officer said that Sharon Hefele told him to open and close the front door.

to open the front door for plaintiff. Again, Sharon Hefele was not disciplined for the violations that occurred on her shift.

Defendant asserts that the discipline plaintiff received was warranted by the severity of the violations. Plaintiff was demoted to correctional officer I for failing to insure that the authorized use of a vehicle was not properly logged. Steve Long testified, rather sheepishly, that he considered this a serious violation for which harsh discipline was justified. The Court does not seek to supplant the considered judgment of persons who have substantial experience in the administration of a correctional facility. The evidence reveals, however, that much more serious violations, when committed by plaintiff's co-workers, were either disregarded or treated much more leniently. Ed Ratliff permitted an unescorted inmate access to Steve Long's locked office. While behind a locked door the inmate had access to Long's private files. Also, the inmate could have acquired a weapon to use against a correctional officer or another inmate. Although the violation constitutes a striking and obvious breach of security, Powell not only refused to discipline Ratliff but praised him for "diffusing a volatile situation."

An inmate escaped during the shift of Michael Doss. Doss admitted that he was negligent in carrying out an order, and that his negligence permitted the escape. Although the escape of an inmate is clearly much more serious than the failure to log the authorized use of a vehicle, Doss was only given a letter of reprimand for the violation.[16]

During the shift of Sharon Hefele the doors to main power room were left open. An inmate who had access to the main power room could turn off the electricity and disable the security

[16] The disciplinary review board recommended that the letter of reprimand be removed from Doss' file after six months. Steve Long, however, decided to retain the letter of reprimand in Doss' file permanently.

system. Although allowing inmates access to the main power room is certainly a more serious violation than the failure to log the authorized use of a vehicle, no one was disciplined for the violation.

The violation for which plaintiff was terminated involved plaintiff's making threats to Powell. Although the Court does not condone the threatening of one's supervisor, the evidence suggests that Powell manufactured the confrontation between plaintiff and himself in order to terminate plaintiff. After plaintiff was informed of his demotion, he was distressed and requested the day off. Steve Long granted the request. As plaintiff attempted to leave, Powell followed him and provoked him into behaving irrationally.[17]

Plaintiff has carried his burden in proving that the reasons given for his demotion and termination were pretextual. Although plaintiff committed several violations of institutional rules, plaintiff was treated much more harshly than his co-workers who committed equally severe or more severe violations.

Although plaintiff proved pretext, plaintiff still bears the ultimate burden to prove that race was the determining factor in defendant's decision. Plaintiff need not prove racial motivation by direct evidence; instead, plaintiff may offer circumstantial evidence sufficient to create an inference of racial motivation. *Jaurequi v. Glendale*, 852 F2d 1128, 1134 (9th Cir. 1988). It is clear that John Powell had placed plaintiff on the express track to termination. It is also clear that Powell received the aid of Ed Ratliff and Steve Long in this endeavor. The question remains, however, whether plaintiff's race played a role in their campaign.

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[17] Less than two weeks earlier, plaintiff reported that correctional officer Arthur Turney cursed plaintiff with highly profane language when plaintiff gave him an unfavorable service rating. Powell concluded that Turney was merely venting justifiable frustration and refused to discipline him. Powell, however, was considerably more sensitive as the victim of insubordination.

Plaintiff demonstrated that he was being disciplined more harshly than his co-workers. It is not clear, however, that plaintiff's race was the motivation for the harsh discipline. Plaintiff was suspended for violations of institutional rules committed on March 3, 1984. Plaintiff's black subordinates who actually committed the violations Elvis Thomas and Charles Kennedy, were not disciplined in any way. Plaintiff was demoted for failing to log the authorized use of a vehicle. Again, plaintiff's black subordinates who committed the violations: Don Moore and Jimmie Davis, were not disciplined in any way. Except for the letter of reprimand issued to correctional officer Michael Doss for permitting an escape, it appears that plaintiff was the only employee disciplined during the period for which evidence was presented. In essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated.

Plaintiff brought before the Court evidence of disproportionate firing of blacks at St. Mary's in 1984. In the period between January, 1984 and December, 1984, approximately twelve blacks were terminated. In the same period, only one white was terminated. During 1984, however, Steve Long hired thirteen blacks. In January, 1984 there were thirty blacks employed at St. Mary's. In December, 1984 there were twenty nine blacks employed at St. Mary's. Therefore, these personnel changes do not create an inference of racial discrimination because the number of black employees at St. Mary's remained constant during the period in question.

Before Steve Long became superintendent at St. Mary's, only the superintendent was white. The assistant superintendent, chief of custody, and three shift commanders were black. Shortly after Steve Long became superintendent, the assistant superintendent and plaintiff were the only blacks in a supervisory position on the custody side. These personnel changes, however, do not create an inference of racial discrimination for two

reasons. First, the full-scale removal of employees from supervisory positions is often required when an institution is being poorly run. Before Steve Long became superintendent, George Lombardi was profoundly dissatisfied with the manner in which St. Mary's was managed. After allowing a period for corrective action, Lombardi commenced a purge of the institution. The fact that most of the supervisory staff was terminated or transferred is not alarming given the widespread problems that St. Mary's experienced under their control.

Second, prior to the 1984 personnel change there was one white and five blacks in supervisory positions. After Steve Long became superintendent, there were four whites and two blacks in supervisory positions. If the position of chief of custody was accepted by the black male to whom it was initially offered, there would have been three blacks and three whites in supervisory positions. It is not unusual that several black supervisors were replaced by whites because blacks held nearly all the supervisory positions before January, 1984.

There were black members of the disciplinary review boards who reviewed plaintiff's violations. Although the Court considers demotion a harsh remedy for failing to insure the logging of a vehicle, the disciplinary review board which recommended this discipline was composed of two blacks and two whites.

Finally, plaintiff introduced a 1981 study by James Davis of the Kansas City and St. Louis (St. Mary's) honor centers. In one section at the end of the study Davis compared the control of power at the two institutions by race, and warned that blacks possessed too much power at St. Mary's. Although heeding the warning of the Davis study would violate Title VII, neither Steve Long nor John Powell were aware of the existence of the study until after the 1984 personnel changes. Steve Long testified that he saw the study for the first time when it was presented to him at his deposition by opposing counsel.

In sum, plaintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge. Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race. For the foregoing reasons, the Court enters judgment in favor of defendant St. Mary's and against plaintiff on the merits of Count I of plaintiff's complaint.

B. Count III – 42 U.S.C. § 1983

In Count III plaintiff alleges that defendant Steve Long violated 42 U.S.C. §1983 by demoting and terminating plaintiff. Title 42 U.S.C. § 1983 is a vehicle for seeking a federal remedy for violations of federally protected rights. *Foster v. Wyrick*, 823 F.2d 218, 221 (8th Cir. 1987). In order to state a cause of action under § 1983 plaintiff must allege that some person, acting under color of state law, has deprived him a federally protected right. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed. 2d 572 (1980).

Steve Long recommended the demotion and termination of plaintiff in his capacity as superintendent of a state correctional facility. Therefore, Long acted under color of state law. Plaintiff alleges that Long violated the equal protection clause of the Fourteenth Amendment. "The central purpose of the equal protection clause of the fourteenth amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). Protection from racial discrimination in employment is provided for by the equal protection clause as well as Title VII.[18] *Foster, supra*, 823 F.2d at 218. Therefore, plaintiff has alleged the violation of a federally protected right.

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[18] A person may sue under the equal protection clause for a claim of disparate treatment based on race. Disparate impact claims, however, are not cognizable under the fourteenth amendment. *New York Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed. 2d 587 (1979).

When § 1983 is used as a parallel remedy with Title VII in a racial discrimination suit, the elements of the cause of action are the same under both statutes. *Irby v. Sullivan*, 737 F.2d 1418, 1431 (5th Cir. 1984). In accordance with the analysis set forth, *supra*, the Court enters judgment in favor of defendant Steve Long and against plaintiff on the merits of Count III of plaintiff's complaint.

Dated this 31st day of January, 1991.

/s/ Stephen Limbaugh
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1571EMSL

Melvin Hicks,
Appellant,

vs.

St. Mary's Honor Center, etc., et al.,
Appellees.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Wollman, Judge Loken, and Judge Morris S. Arnold would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

September 3, 1991

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Eighth Circuit properly reversed a judgment for the defendant by the District Court in a Title VII and a 42 U.S.C. §1983 action involving a claim of discriminatory discharge and demotion because of race? Plaintiff established a prima facie case under *McDonnell Douglas /Burdine*, and proved that defendant's proffered legitimate, non-discriminatory reasons for the discharge and demotion were pretextual. Could the trial court ignore the inference of racial discrimination established by the prima facie case and deny recovery on the grounds that some reason unsupported by the evidence and undisclosed by the employer was the reason for the adverse action?

2. Whether the holding of the Court of Appeals for the Eighth Circuit is in conflict with the First and Seventh Circuit's decisions on the same matter and applicable decisions of this Court?

LIST OF PARTIES TO THE PROCEEDINGS

1. St. Mary's Honor Center, Petitioner herein and Defendant in District Court.

2. Steve Long, Petitioner herein and Defendant in District Court.

   St. Mary's Honor Center is a minimum security correctional facility operated by the Missouri Department of Corrections and Human Resources.

3. Melvin Hicks, Respondent herein and Plaintiff in the District Court.

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No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER and STEVEN LONG,
Petitioners,

VS.

MELVIN HICKS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Defendant St. Mary's Honor Center is an adult correctional institution of the Missouri Department of Corrections which is an agency of the State of Missouri and defendant Steve Long was the Superintendent of the facility.

Respondent Melvin Hicks is an African-American (black) who was demoted from his supervisory position as shift commander at St. Mary's Honor Center and subsequently discharged by the defendants. He filed suit in federal court alleging a violation of Title VII and 42 U.S.C. §1983.

Note: (P -__) refers to Petition For Writ of Certiorari; (A- __) refers to Appendix of Petition For Writ of Certiorari.

Plaintiff established that he was a member of a minority group, that he was qualified for his supervisory position, that he was first demoted and then fired and was replaced by a white person. Defendants stated plaintiff was demoted and discharged because of the severity and accumulation of violations of institutional rules.

The district court held that "Plaintiff has carried his burden in proving that the reasons given for his demotion and termination were pretextual. . . ." (A-26) The court then went on to conclude that Hicks had not proven that the "crusade [to discharge him] was racially rather than personally motivated." (A-27)

The Court of Appeals had before it the transcript of the trial, the extensive briefs of the parties and it reviewed the findings of the trial court concerning the proffered reasons for the adverse actions against plaintiff.

It determined that the defendants had never contended that the adverse actions against plaintiff were taken because of personal motivation. The Eighth Circuit stated, ". . . it was improper for the district court to assume — without evidence to support the assumption — that defendants' actions were somehow 'personally motivated' . . . defendants simply never stated that personal motivation was a reason for their actions or offered evidence to support such a claim."(A-10).

Next the Court reviewed the findings of the trial court on the issue of pretext and at the same time explored the extensive findings of the district court which could support a finding of racial discrimination.

On March 3, 1984 two white transportation officers submitted a written report to plaintiff's immediate supervisor, Captain Powell, about violations of institutional rules by employees under plaintiff's supervision. Plaintiff, the only remaining black

shift commander[2] was suspended for five days on the grounds that it was Powell's policy to discipline only the shift commander for violations occurring during his shift (A-3). White shift commanders were not disciplined for rule violations which occurred on their shift by employees under their supervision (A-5).

On March 19, 1984 plaintiff permitted two correctional officers to use a St. Mary's vehicle for an emergency. Neither the correctional officers nor the control center officer logged the use of the car despite a rule requiring such logging. They were not disciplined, however, plaintiff was demoted (A-3). Ratliff and Slinkard, the two white transportation officers who had reported the March 3rd incident, did not log their use of a vehicle in violation of the rules and were not disciplined.

On March 21, 1984 plaintiff investigated a fight between two inmates and drafted a memorandum notifying Powell of the fight and injury to an inmate. Plaintiff directed the officer who took the injured inmate to the hospital to write a report. Powell then charged plaintiff with failing to investigate the fight, and this led to plaintiff's demotion on April 19, 1984 (A-4).

After his demotion Plaintiff requested and obtained permission to leave, at this point Powell followed plaintiff and provoked him into acting irrationally (A-4) (P-7). This led to a recommendation from the disciplinary board for a three day suspension which Long ignored and instead effectively recommended plaintiff's discharge. (A-4).

Differences in treatment of plaintiff as a black correctional officer and white correctional officers were found by the trial court:

(1) Turney, a white correctional officer cursed plaintiff, his supervisor, with highly profane language because of a poor service rating. No disciplinary action was taken against the white

---

[2] The other black shift commanders Greenlea, McAvoy and Woodward had been removed. (A-15, Note 1)

officer because Powell concluded that Turney was "merely venting justifiable frustration" (A-4, 5). When plaintiff, was provoked by Powell, his white supervisor, Powell was considerably more sensitive as the victim of insubordination (Note 4, A-5). This situation led to plaintiff's dismissal.

(2) Sharon Hefele, a white shift commander violated one of the same rules that led to plaintiff's five days suspension and no disciplinary action was taken (A-5).

(3) Sharon Hefele, was not disciplined when she left two security doors unlocked (A-5).

(4) John Newland, white, took a set of St. Mary's keys home with him and no disciplinary action was taken.

(5) Michael Doss, white, negligently permitted an inmate to escape and received only a letter of reprimand.

(6) Ratliff, white, let his brother come in the facility with a gun and no disciplinary action was taken.

(7) Ratliff and Slinkard, both white, failed to log the use of a St. Mary's vehicle and no disciplinary action was taken.

(8) Ratliff used an inmate to break into Supt. Long's office to get some passes and no disciplinary action was taken.

In addition to the specific situations mentioned above between December 1983 and December 1984 twelve blacks and one white were fired. (Note 6, A-6). Four of the twelve were supervisors (Greenlea, Carl MacAvoy, Charles Woodward and Hicks) and were replaced by whites (A-12). No white supervisors were fired. No black supervisors were hired and no blacks were promoted. Of the ten white employees on the custody roster five were promoted (Note 6, A-6). Twelve blacks were hired, however, Long had nothing to do with the hiring of CO-1s or clerk typists all of whom were hired by the Personnel Office in Jefferson City. At the time of the trial Long had been promoted

to an administrative office in the Department of Corrections and Vincent A. Banks the new Superintendent of the facility testified that no one at the Honor Center had anything to do with hiring CO-1s and clerk typists (3Tr. 46-49). As Superintendent, Long had authority to effectively recommend terminations (A-7) and also recommended promotions and hiring of CO-2s (shift commanders). As noted before no blacks were hired in supervisory positions in custody whereas 5 of the ten whites employed in custody were promoted (A-6). In addition to the above evidence a study conducted by the defendant agency in 1980-81 found that "too many blacks were in positions of power at St. Mary's" (Note 6, A-6). The trial court held that "Plaintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge." The court then went on to conclude that Hicks had not proven that "the crusade [to discharge him] was racially rather than personally motivated." (A-27). The district court stated, "Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race and entered judgment for defendants.

On appeal the Eighth Circuit reversed stating that when a plaintiff makes a prima facie case and defendant's proffered non-discriminatory reasons are shown to be pretextual plaintiff is not required to negate undisclosed reasons for which no evidence is presented. Under the circumstances of this case the Court of Appeals held that plaintiff was entitled to judgment and reversed the decision of the district court.

SUMMARY OF ARGUMENT

Respondent disagrees with the question presented by the Petitioners and argues that the questions posed by the Respondent more accurately reflects the holding of the Eighth Circuit and the actual questions which are presented for review.

The Eighth Circuit decision is not in conflict with decisions of the Supreme Court of the United States. *McDonnell Douglas/ Burdine* permits a plaintiff to establish proof of discrimination by the indirect method of proving that the defendant's proffered reasons for the adverse action(s) are pretextual. The inference of discrimination upon a showing of a prima facie case does not drop from the case merely because a defendant presents false testimony under oath in Federal Court as to the reasons for the adverse action(s).

The decision by the Eighth Circuit is not in conflict with other Circuits. None of the cases cited by petitioners has a similar factual situation where plaintiff as part of his proof of racial discrimination under *McDonnell Douglas/Burdine* was first required to disprove defendants' non-discriminatory/legitimate proffered reasons for the adverse action against the plaintiff, and secondly required to negate undisclosed reasons for the adverse action where no evidence in support of such undisclosed reason was offered by the defendant.

In addition to the above there was ample evidence of disparate treatment of plaintiff because of his race which justifies an inference of racial discrimination. This is evidenced by: (1) comparing the four blacks in supervisory positions fired as opposed to no whites; (2) the number of whites promoted (5); (3) the fact that plaintiff, a black shift commander was disciplined for minor offenses and white shift commanders were not disciplined for similar offenses and for more serious offenses were given only reprimands.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

St. Mary's Honor Center and Steve Long have filed a Petition For Writ of Certiorari in this Court contending that the decision of the Eighth Circuit is in conflict with the First and Seventh Circuits and applicable decisions of this Court.

I.

FAILURE TO PROPERLY DEFINE THE QUESTIONS PRESENTED FOR REVIEW

The issue presented for review by the petitioners fails to present to this Court the actual holding of the case and fails to specifically identify the questions that this Court must review.

Respondent disagrees with the question presented by the Petitioners and states that the questions presented by Respondent more accurately presents the issues to be considered.

II.

THE DECISION OF THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

In this case the District Court held that while Hicks had established a prima facie case, and had established that the reasons proffered by the defendants were false, that he had failed to disprove possible undisclosed reasons for the adverse action. The district court in its memorandum stated, "In essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated" (A-27). *Hicks v. St. Mary's Honor Center*, 756 F. Supp. 1244 (E.D. Mo. 1991).

The Eighth Circuit held that it was error for the district court to assume, without evidence to support the assumption that defendants' action were somehow personally motivated (A-10). *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992).

Petitioners argue in their brief, (Note 2, P-8) that the District Court did not adopt the "pretext-plus" approach to proof of racial discriminatory treatment cases. The issue then resolves itself down to whether, in order to prove pretext, plaintiff in addition to disproving the disclosed reasons must as part of his proof negate reasons undisclosed by the defendants and for which no evidence is offered by the defendants. When plaintiff failed to disprove undisclosed reasons could the district court ignore the inference of discrimination created by the prima facie case and proof of pretext of the disclosed reasons, and enter judgment for the defendants on the grounds that plaintiff had not established that the adverse actions were racially rather than personally motivated?

The Eighth Circuit held that when plaintiff had made a prima facie case and established that the non-discriminatory and legitimate reasons proffered by the defendants for the adverse actions were pretextual, it was error for the district Court to assume that some undisclosed reason for which no evidence was offered was the true reason for the adverse actions.

Defendants argue that when defendants give a reason, regardless of whether it is true or not, that the inference of discrimination drops from the case (P-8) and plaintiff must prove by direct or other indirect evidence that race was a motivating factor in the adverse action. Defendants' contention that *McDonnell Douglas/Burdine* so provides is a misstatement of these cases. *McDonnell Douglas v. Green*, 411 U.S. 792, 800 (1973), established the order and allocation of proof in a private non-class action challenging employment discrimination. First, Plaintiff must establish a prima facie case and establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the employee, *Texas Dept. of Community*

Affairs v. Burdine, 450 U.S. 248, 254. It is clear that if the employer is silent in the face of the presumption, the Court must enter judgment for the Plaintiff because no issue of fact remains in the case, *Burdine* at 254. To avoid a finding of discrimination, the Defendant must "clearly set forth, through the introduction of admissible evidence, the reason for the action", *Burdine* at 255. Then *Burdine* states that the employee can meet the ultimate burden of proving race discrimination either directly by persuading the Court that its discriminatory reason more likely than not motivated the employer or indirectly by showing that the employer's improper explanation is unworthy of credence.

The defendants in this case argue under their interpretation of *McDonnell/Burdine*, that indirect proof of discrimination provided by the second option of *Burdine* is no longer viable and that plaintiff must prove discrimination directly by persuading the Court that its adverse action was motivated by discriminatory reasons. The defendants misinterpret *Burdine*.

Defendants also argue that *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1978) is in conflict with the decision of the Eighth Circuit. The facts in *Aikens* were not similar to the facts in this case. In *Aikens* the Court of Appeals had held that the District Court had erred in requiring the employee to offer direct proof of discriminatory intent, and also erred when it required the employee to show, as part of his prima facie case, that the employee was as qualified or more qualified than the people who were promoted. On certiorari the Supreme Court held that the District Court erroneously thought that the employee was required to submit direct evidence of discriminatory intent and erroneously focused on the question of a prima facie case rather than directly on the question of discrimination, so that the Supreme Court could not be certain that the findings of fact of the District Court in favor of the employer were not influenced by the District Court's mistaken view of the law. Of significance is the statement by Justice Blackmun and concurred in by Justice Brennan which states:

> I join the Court's opinion. I write to stress the fact, however, that as I read its opinion, the Court today reaffirms the framework established by *McDonnell Douglas Corp. v. Green*, (cite omitted), for Title VII cases. . . . This ultimate burden (proof of intentional discrimination) may be met in one of two ways. First as the Court notes, a plaintiff may persuade the court that the employment decision more likely than not was motivated by a discriminatory reason. . . . In addition, however, this burden is also carried if the plaintiff shows 'that the employer's proffered explanation is unworthy of credence. *Aikens*, 460 U.S. 717, 718.

The actual holding of the case was that under Title VII a plaintiff in a job discrimination case was not required to submit direct evidence of discriminatory intent to allow the court to reach the question of discrimination. Respondent submits that this holding is not in conflict with the decision of the Eighth Circuit in Hicks.

III.

THE ALLEGED CONFLICT WITH THE FIRST & SEVENTH CIRCUITS

The Defendants claim the Court of Appeals holding in *Hicks* is in conflict with the United States Court of Appeals for both the First and Seventh Circuits. Defendants cite *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557 (7th Cir. 1987), *Samuels v. Raytheon Corp.*, 934 F.2d 388, (1st Cir. 1992) and *Villanueva v. Wellesley College*, 930 F.2d 124 (1st Cir. 1991). A close study of these cases reveals substantial differences from *Hicks*. The district court held that the employer had lied about its proffered reasons for demoting and firing plaintiff, but that plaintiff had not proved that the crusade was racially rather than personally motivated (A-27).

Shager involved a situation where a discharged employee brought an age discrimination suit against his former employer and the trial court granted defendant's motion for summary judgment. The specific ruling which Judge Posner made was that a material fact issue existed which precluded summary judgment. The case does support the concept that the establishment of a prima facie case creates an inference of discrimination.

Pollard stands for the proposition that an adverse action for mistaken reasons honestly held is not pretext. The trial court found that the employer did not have good cause to fire its employee, *Pollard* at 559. The Seventh Circuit pointed out if an employer explained the reason behind its decisions, but the decision was ill informed or ill considered, the employer's explanation is not a pretext. Judge Esterbrook stated, because the District Court confused "mistake" with the word "pretext", its decision may not stand because pretext was not established. In the *Hicks* case, "pretext" was clearly established and therefore, *Pollard* is not in conflict.

In *Samuels*, the plaintiff established a prima facie case under the *McDonnell Douglas* formulation and the employer cited as its reason for the adverse action, that plaintiff failed to return to work after the medical department found her fit to resume her duties. The Court pointed out that there was a dispute as to whether or not plaintiff was disabled and stated that even if the employer was mistaken about whether or not she could or could not return to work, that the trial court could find that the decision was made in good faith and was not the basis for discrimination. In *Samuels*, no pretext was found whereas in *Hicks*, pretext was clearly established.

The case of *Villanueva v. Wellesley College*, involved a tenure situation where defendant was granted summary judgment. In *Villanueva*, the Court held that the plaintiff had failed to establish that she was qualified under the college or university standards and therefore, failed to make a prima facie case. *Villanueva* is not

comparable to *Hicks* for *Hicks* clearly made a prima facie case and proved pretext. In addition, Hicks presented evidence of other disparate treatment.

The First Circuit in the case of *Fields v. Clark University*, 966 F.2d 49 (1st Cir. 1992) involved a Title VII claim of sex discrimination in the denial of tenure to a teacher at the University. The First Circuit discussed plaintiff's method of proving discrimination after the employer had given its non-discriminatory reason in response to a prima facie showing. The Court stated:

> The plaintiff then must have an opportunity to prove by a preponderance of the evidence that the defendant's proffered reason was merely a pretext for discrimination. *If she successfully demonstrates that such a pretext exists, she has proven defendant's commission of a Title VII violation; if she fails to do so, the presumption of discrimination drops from the case* . . . (emphasis added)

The First Circuit in the above decision holds that the presumption drops from the case only if a Plaintiff fails to prove pretext. This does not conflict with the Eighth Circuit's holding in *Hicks*.

The conflict of the circuits perceived by the Defendants, based on the cases cited, on close examination, becomes illusory. The decisions of this Court are in line with the decisions from other circuits. *King v. Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985); *Thormbrough v. Columbus & Greenville Ry. Co.*, 760 F.2d 633, 639-40 (5th Cir. 1985); *Sims v. Cleland*, 813 F.2d 790, 793 (6th Cir. 1987); *Caban-Wheeler v. ELSEA*, 904 F.2d 1549, 1554 (11th Cir. 1990); *Ibrahim v. N.Y. State Dept. of Health*, 904 F.2d 161, 168 (2nd Cir. 1990); and *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1000 (3rd Cir. 1988).

The employer is required to clearly set forth, through the introduction of admissible evidence, the reason for the employment decision, *Burdine*, supra at 255. It is significant that neither Powell, Long or any other witness for the Defendants claim that there was any reason other than the reasons proffered. There is no evidence to support any violation of the Civil Service System, personal or political favoritism, random conduct or mistake such as existed in *Pollard*, supra.

The Eight Circuit recognized that the comparison of the treatment of supervisors with non-supervisory personnel was not determinative of non discriminatory action. It is significant that Long fired twelve (12) Afro- Americans and one (1) white. The fact that the Department of Personnel of the State of Missouri, an agency over which Long had no control, hired most of the twelve (12) Afro-Americans to replace those fired tells us nothing about the non discriminatory proclivity of Long. Note 6 on Page 6 of the Court's Opinion contains a report on Plaintiff's contention about discrimination against Black supervisors and a reference to the trial court's finding that a study of the Honor Centers for the Department determined that too many Blacks were in a position of power in St. Louis. Mr. Davis who did the study pointed out that in St. Louis, "the potential for subversion of the Superintendent's power — should the staff become racially polarized — is very real.

IV.

DISCRIMINATORY TREATMENT OF HICKS

The trial court ignored the wholesale dismissal of Blacks as compared to the dismissal of one white, and clearly erred when it found that Long had hired twelve blacks because Long had nothing to do with the hiring of entry level positions. Hicks was placed on the express train for termination by Long and Powell. He was abused, harassed, and mistreated for pretextual reasons. An inference of discrimination was established by his prima facie case. The trial court erred as a matter of law when it held that no inference of discrimination existed under the facts of this case.

Plaintiff established a prima facie case and proved that the employer's non discriminatory legitimate reasons were pretextual. The limited issue of whether a fact finder can ignore the inference of racial discrimination and make a determination that some reason undisclosed by the employer was the reason for the adverse action is not a matter of exceptional importance which warrants the granting of a writ of certiorari from this Court.

A review of the cases cited by defendants do not show a clear conflict between this case and the First and Seventh Circuits.

CONCLUSION

The facts of this case were carefully reviewed by a three judge panel after full argument by the parties. The opinion reflects that the factual situation was carefully analyzed, and the law as applied to this case closely scrutinized. The opinion was carefully crafted and received the unanimous approval of all three members of the panel. A petition for rehearing was denied. The Court of Appeals righted a grievous wrong. Its decision when applied to the facts of this case correctly states the law and follows the applicable decisions of this Court. The decision of the Eighth Circuit is supported by *McDonnell Douglas/Burdine* and a host of other cases. It is not a matter of exceptional importance and the decision of the Eighth Circuit is not in conflict with other circuits.

McDonnell Douglas v. Green has been settled law for nineteen years and *Texas Department of Comunity Affairs v. Burdine* since 1981. Thousands of Federal and State cases and administrative decisions are predicated on the holdings in these cases. Settled law should only be changed under the most exigent circumstances.

For all of above reasons the petition for Writ of Certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER and STEVEN LONG,
Petitioners,

vs.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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NOTATION REGARDING OMITTED ITEMS

The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

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RELEVANT DOCKET ENTRIES

June 27, 1988	Plaintiff's First Amended Complaint
July 5, 1988	Defendant Long's Answer to Plaintiff's First Amended Complaint
July 5, 1988	Defendant St. Mary's Honor Center's Answer to Plaintiff's First Amended Complaint
December 7, 1989	Order and Memorandum Granting Summary Judgment in Favor of Defendant Long on Count II
June 5, 1990	Non-Jury Trial (First Day)
June 6, 1990	Non-Jury Trial (Second Day)
June 14, 1990	Non-Jury Trial (Third Day)
January 31, 1991	Order Granting Summary Judgment in Favor of Defendants on Counts I and III
January 31, 1991	Memorandum in Support of Order
February 28, 1991	Notice of Appeal
July 23, 1992	Opinion and Judgment of Court of Appeals
August 5, 1992	Petition for Rehearing or Rehearing en banc
September 3, 1992	Order Denying Petition for Rehearing or Rehearing en banc

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NO. 88-0109-C-5

MELVIN HICKS,
Plaintiff,

vs.

ST. MARY'S HONOR CENTER, et al.,
Defendants.

PLAINTIFF'S FIRST AMENDED COMPLAINT

Comes now the plaintiff, by and through his attorney, and for his first amended complaint against defendants states as follows:

COUNT I - 42 U.S.C. 2000 (e) et seq.

PARTIES

1. Plaintiff Melvin Hicks is a black male, a resident of the County of St. Louis in the State of Missouri, and a citizen of the United States of America.

2. Defendant St. Mary's Honor Center is a facility of the Division of Adult Institutions of the Department of Corrections and Human Resources of the State of Missouri and is located in the City of St. Louis in the State of Missouri. One of its purposes is to serve as a halfway house for male inmates who are released from medium and minimum security correctional institutions to the honor centers program for the Center to assist the inmates in their reentry into the community.

3. The defendant Division of Adult Institutions of the Department of Corrections and Human Resources of the State of Missouri (hereinafter also referred to as the "Division") is a governmental unit of the State charged with the supervision and

management of adult correctional institutions, including the St. Mary's Honor Center.

4. Defendant Steve Long was at all times relevant herein the Superintendent of St. Mary's Honor Center and was charged with receiving the recommendation of disciplinary review boards and to recommend personnel actions to the Director of the Division. Defendant Long is presently serving as the Assistant Director of Corrections and is being sued in his individual and official capacity.

JURISDICTION

5. Jurisdiction of this Court is invoked pursuant to 42 U.S.C.§2000(e) et seq., 28 U.S.C. §1331, and 28 U.S.C. §1343 as plaintiff is alleging violations of his rights guaranteed by 42 U.S.C. §§1981, 1983, 1988, and 2000(e) et seq.

NATURE OF THE ACTION

6. Plaintiff was employed by defendants on August 22, 1978, and was dismissed by defendants from his employment as a Corrections Officer I with St. Mary's Honor Center effective June 7, 1984.

7. At the time of his dismissal, plaintiff's monthly salary was $1.169.00.

8. That prior to his dismissal, plaintiff was demoted to the position of Corrections Officer I from the position of Corrections Officer II by letter dated April 24, 1984, effective May 7, 1984.

9. That plaintiff appealed his demotion and dismissal to the Personnel Advisory Board which affirmed his demotion and dismissal by action dated January 11, 1985.

10. On or about April 11, 1984, plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as the "EEOC"), numbered

07284105, alleging racial discrimination in employment conditions.

11. That the reason given for plaintiff's demotion was "failure to adequately fulfill the responsibilities of his position".

12. That the true reasons for his demotion were his race, black, and retaliation for having filed a prior charge of discrimination against defendants.

13. That the reason given for his dismissal was an allegation of insubordination which was alleged to have occurred on April 27, 1984.

14. That the true reasons for his dismissal were his race, black, and retaliation for having filed a prior charge of discrimination against defendants.

15. That on or about May 7, 1984, plaintiff filed a Charge of Discrimination against defendants with the EEOC alleging that he had been demoted due to racial discrimination and in retaliation of his having filed a prior charge of discrimination, said charge being numbered 072841261, thereafter plaintiff amended his complaint by charge numbered 072850649 to allege that he had been dismissed due to his race Black and in retaliation of his having filed a prior charge of discrimination.

16. That on or about October 30, 1987, the EEOC, having concluded its processing of Charge Number 07284105, issued plaintiff a "right-to-sue letter".

17. That on or about March 18th, 1988, the EEOC having concluded its processing of Charge Number 072841261 and 072850649, issued plaintiff a "right-to-sue letter".

18. Shortly after his dismissal, plaintiff filed a claim with the Division of Employment Security of the State of Missouri for unemployment benefit payments. The deputy determined that

the plaintiff was not dismissed for misconduct connected with his job and was not disqualified for benefits, said decision being rendered on June 27th, 1984. The Department of Corrections and Human Resources on July 6, 1984 filed an appeal from the deputy's decision to the Missouri Division of Employment Security and a hearing was scheduled for August 14th, 1984. The employer did not appear at this hearing, the employer's appeal was dismissed and the determination of the deputy became final.

19. That the defendants had full opportunity to litigate the issue of whether plaintiff was discharged for misconduct connected with his work before the Division of Employment Security of the State of Missouri; that under the laws of the State of Missouri that existed at that time, the issue of misconduct has been determined and that defendant is precluded from contesting this issue in any other forum.

20. That as a result of the discriminatory and retaliatory actions of defendants, plaintiff has lost wages and ancilliary employment benefits, all to his damage in the approximate amount of Seventy-Five Thousand Dollars ($75,000.00).

WHEREFORE, the plaintiff prays for judgment against defendants, jointly and severally, in the amount of Seventy-Five Thousand Dollars ($75,000.00), reinstatement to his position as Corrections Officer II, and for his attorney fees and costs incurred herein.

COUNT II - 42 U.S.C. §1981

21. Plaintiff hereby repeats, realleges, and incorporates by reference herein the allegations contained in Paragraphs One through Twenty, inclusive, of this complaint.

22. That the actions of defendants have denied plaintiff, a black citizen, the full and equal benefits of the laws and proceedings for the security of persons and property as is enjoyed by white citizens in violation of plaintiff's rights under 42 U.S.C. §1981.

23. That the actions of defendant Long in so depriving plaintiff were willful and intentional.

24. That due to the discriminatory actions of defendant Long, plaintiff has been caused to lose wages and ancilliary employment benefits, has been caused to suffer stress and loss of reputation, of self-esteem and of the opportunities to advance in his profession.

WHEREFORE, plaintiff prays for judgment against defendant Long in his official and individual capacity in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) in actual damages and for FIFTY THOUSAND ($50,000.00) DOLLARS in punitive damages, plus his attorney fees and costs incurred herein.

COUNT III- 42 U.S.C. §1983

25. Plaintiff hereby repeats, realleges, and incorporates by reference herein the allegations contained in Paragraphs One through Twenty, inclusive, of his complaint.

26. That at all times mentioned herein defendants were acting under color of statutes, regulations, customs, or usage, of the State of Missouri, to subject plaintiff to the deprivation of his deprivation of his rights and privileges as secured by the Constitution and the laws in violation of 42 U.S.C. §1983.

27. That the actions of defendant Long in so depriving plaintiff were willful and intentional.

28. That due to the discriminatory actions of defendant Long plaintiff has been caused to lose wages and ancilliary employment benefits, has been caused to suffer stress and loss of reputation, of self-esteem and of the opportunities to advance in his profession.

WHEREFORE, plaintiff prays for judgment against defendant Long in his individual and official capacity in the amount of

ONE HUNDRED THOUSAND DOLLARS ($100,000.00) in actual damages and FIFTY THOUSAND ($50,000.00) DOLLARS in punitive damages, plus his attorney fees and costs incurred herein.

(Subscription omitted in printing.)

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing.)

DEFENDANT LONG'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Comes now defendant Steve Long, and in answer to Plaintiff's First Amended Complaint:

Count I

1. Admits that plaintiff Melvin Hicks is a black male.

2. Admits that defendant St. Mary's Honor Center is an adult correctional institution of the Division of Adult Institutions of the Department of Corrections and Human Resources of the State of Missouri and is located in the City of St. Louis in the State of Missouri.

3. Admits that defendant Division of Adult Institutions of the Department of Corrections and Human Resources of the State of Missouri is a governmental unit of the state charged with the regulation, control and supervision of adult correctional institutions, including the St. Mary's Honor Center.

4. Admits that Steve Long was the Superintendent of St. Mary's Honor Center from January 7, 1984, through May 16, 1985, and was charged with receiving the recommendations of administrative review committees and recommending personnel actions to the Director of the Division of Adult Institutions, and is presently serving as an Assistant Director of the Division of Adult Institutions.

5. Admits that plaintiff is alleging violations of his rights guaranteed by 42 U.S.C. §S 1981, 1983 and 2000e, *et seq*., and is invoking the jurisdiction of this Court under 42 U.S.C. § 2000e, *et seq*. and 28 U.S.C. §§ 1331 and 1343.

6. Admits that plaintiff was employed by the Division of Corrections of the Department of Social Services on August 22, 1978 and was dismissed by the Division of Adult Institutions of the Department of Corrections and Human Resources from his employment as a corrections officer I at St. Mary's Honor Center effective June 7, 1984.

7. Denies each and every other allegation of Count I of Plaintiff's First Amended Complaint not hereinabove expressly admitted.

8. Count I fails to state a claim upon which relief can be granted.

9. Count I is barred by laches and the applicable statute of limitations, 42 U.S.C. § 2000e-5(f).

10. Count I is barred by plaintiff's failure to file charges of discrimination or retaliation in demotion or discharge with the EEOC within 180 days of their occurrence, 42 U.S.C. § 2000e-5(e).

11. Count I is barred by plaintiff's failure to name defendant Long as a respondent in any charges of discrimination or retaliation in demotion or discharge filed with the EEOC, 42 U.S.C. 5 2000e-5(f).

12. Defendant Long is not subject to suit under 42 U.S.C. § 2000e, *et seq*. in his individual capacity.

13. Affirmative collateral estoppel does not apply.

14. Affirmative collateral estoppel is barred by § 288.215, H.C.S. H.B. 1485 (84th Missouri General Assembly, 2nd Regular Session).

WHEREFORE, defendant Long requests that this Court dismiss with prejudice Count I of Plaintiff's First Amended Complaint, and award defendant Long his costs and expenses of this

action, including a reasonable attorney's fee, and such other and further relief as this Court considers appropriate.

Count II

15. Incorporates herein by reference, as if set forth verbatim, the allegations of paragraphs 1 through 7, inclusive, of Count I of this answer.

16. Denies each and every other allegation of Count II of Plaintiff's First Amended Complaint not hereinabove expressly admitted.

17. Count II fails to state a claim upon which relief can be granted.

18. Defendant Long has qualified immunity from liability and suit.

19. Defendant Long has good faith immunity from liability.

20. Count II is barred by collateral estoppel or *res judicata*.

21. Defendant Long, in his official capacity, has Eleventh Amendment immunity.

22. 42 U.S.C. § 2000e, *et seq*. is plaintiff's exclusive remedy for discrimination or retaliation in demoiion or discharge.

23. Count II is barred by the applicable statute of limitations, § 516.140, RSMo 1986, or § 516.130, RSMo 1986.

24. Affirmative collateral estoppel does not apply.

25. Affirmative collateral estoppel is barred by § 288.215, H.C.S. H.B. 1485 (84th Missouri General Assembly, 2nd Regular Session).

WHEREFORE, defendant Long requests that this Court dismiss with prejudice Count II of Plaintiff's First Amended Complaint, and award defendant Long his costs and expenses of this

action, including a reasonable attorney's fee, and such other and further relief as this Court considers appropriate.

Count III

26. Incorporates herein by reference, as if set forth verbatim, the allegations of paragraphs 1 through 7, inclusive, of Count I of this answer.

27 Denies each and every other allegation of Count III of Plaintiff's First Amended Complaint not hereinabove expressly admitted.

28. Count III fails to state a claim upon which relief can be granted.

29. Defendant Long has qualified immunity from liability and suit.

30. Defendant Long has good faith immunity from liability.

31. Count III is barred by the applicable statute of limitations, § 516.140, RSMo 1986, or § 516.130, RSMo 1986.

32. Count III is barred by collateral estoppel or *res judicata*.

33. Defendant Long, in his official capacity, has Eleventh Amendment immunity.

34. 42 U.S.C. § 2000e, *et seq*. is plaintiff's exclusive remedy for discrimination or retaliation in demotion or discharge.

35. Affirmative collateral estoppel does not apply.

36. Affirmative collateral estoppel is barred by § 288.215, H.C.S. H.B. 1485 (84th Missouri General Assembly, 2nd Regular Session).

WHEREFORE, defendant Long requests that this Court dismiss with prejudice Count III of Plaintiff's First Amended Complaint, and award defendant Long his costs and expenses of

this action, including a reasonable attorney's fee, and such other and further relief as this Court considers appropriate.

(Subscription omitted in printing.)

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing.)

DEFENDANT ST. MARY'S HONOR CENTER'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Comes now defendant St. Mary's Honor Center, and in answer to Plaintiff's First Amended Complaint:

Count I

1. Admits that plaintiff Melvin Hicks is a black male.

2. Admits that defendant St. Mary's Honor Center is an adult correctional institution of the Division of Adult Institutions of the Department of Corrections and Human Resources of the State of Missouri and is located in the City of St. Louis in the State of Missouri.

3. Admits that defendant Division of Adult Institutions of the Department of Corrections and Human Resources of the state of Missouri is a governmental unit of the State charged with the regulation, control and supervision of adult correctional institutions, including the St. Mary's Honor Center.

4. Admits that Steve Long was the Superintendent of St. Mary's Honor Center from January 7, 1984, through May 16, 1985, and was charged with receiving the recommendations of administrative review committees and recommending personnel actions to the Director of the Division of Adult Institutions, and is presently serving as an Assistant Director of the Division of Adult Institutions.

5. Admits that plaintiff is alleging violations of his rights guaranteed by 42 U.S.C. §S 1981, 1983 and 2000e, *et seq*., and

is invoking the jurisdiction of this Court under 42 U.S.C. § 2000, *et seq*. and 28 U.S.C. §§ 1331 and 1343.

6. Admits that plaintiff was employed by the Division of Corrections of the Department of Social Services on August 22, 1978 and was dismissed by the Division of Adult Institutions of the Department of Corrections and Human Resources from his employment as a corrections officer I at St. Mary's Honor Center effective June 7, 1984.

7. Denies each and every other allegation of Count I of Plaintiff's First Amended Complaint not hereinabove expressly admitted.

8. Count I fails to state a claim upon which relief can be granted.

9. Count I is barred by laches and the applicable statute of limitations, 42 U.S.C. § 2000e-5(f).

10. Count I is barred by plaintiff's failure to file charges of discrimination or retaliation in demotion or discharge with the EEOC within 180 days of their occurrence, 42 U.S.C. § 2000e-5(e).

11. Affirmative collateral estoppel does not apply.

12. Affirmative collateral estoppel is barred by § 288.215, H.C.S. H.B. 1485 (84th Missouri General Assembly, 2nd Regular Session).

WHEREFORE, defendant St. Mary's Honor Center requests that this Court dismiss with prejudice Count I of Plaintiff's First Amended Complaint, and award defendant St. Mary's Honor Center its costs and expenses of this action, including a reasonable attorney's fee, and such other and further relief as this Court considers appropriate.

Count II

13. Makes no answer to Count II, because Count II is not directed to defendant St. Mary's Honor Center.

Count III

14. Makes no answer to Count III, because Count III is not directed to defendant St. Mary's Honor Center.

(Subscription omitted in printing.)

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing.)

VOLUME 1
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE STEPHEN N. LIMBAUGH

APPEARANCES:

For the Plaintiff: CHARLES R. OLDHAM
317 North 11th Street
Suite 1220
St. Louis, MO 63101

For the Defendants: GARY L. GARDNER
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P.O. Box 899
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* * *

MELVIN HICKS — DIRECT EXAMINATION

[1-12]

* * *

MELVIN HICKS, PLAINTIFF, SWORN:

DIRECT EXAMINATION

* * *

QUESTIONS BY MR. OLDHAM:

Q. Would you state your name, please?

[1-13]

A. Melvin Hicks.

* * *

[1-29]

* * *

Let me hand you what has been marked as Plaintiff's Exhibit 3.

Mr. Hicks, what is that document?

A. This is a memo stating that effective February the 4, that I would be Shift Commander of the first shift., 11:30 p.m. to 7:30 a.m.

Q. That was the shift that you were on?

A. Yes, it was.

* * *

[1-31]

* * *

Now, shortly after that, did you have an occasion to receive another shift change?

A. Yes, I did.

Q. And who notified you about the shift change?

A. Captain Powell.

Q. Let me hand you what has been marked as Exhibit 10.

And is this your notification of your shift change?

A. Yes, sir.

Q. After you got your notification of your shift change, did you make any objections, or request any considerations?

A. Yes, I did.

Q. And who did you address that to?

A. I wrote a request to Captain Powell.

Q. Okay.

I hand you what has been marked as Plaintiff's Exhibit 11.

Is this the memorandum you wrote requesting that change?

A. Yes, sir.

Q. Basically why did you request a shift change?

A. For the reason my wife was going back to work, and [1-32] I was going back to school.

Also, in order to attend church on Sundays.

Q. All right.

Was your request — What happened to your request?

A. It was denied.

* * *

[1-68]

Now, at the time of your demotion, you had a [1-69] meeting with Mr. Long and Captain Powell, is that correct?

A. That's correct.

Q. This was sometime in April?

A. Yes.

Q. All right.

Who else was present at that meeting?

A. Mr. Vincent Banks.

Q. Now, what was said at that meeting?

MR. GARDNER: Objection, your Honor. It's too broad and vague.

QUESTIONS BY MR. OLDHAM:

Q. Can you tell me what —

THE COURT: Why didn't you particularize it, Counsel.

QUESTIONS BY MR. OLDHAM:

Q. Can you tell me what Mr. Long said to you?

A. Yes.

I was called into Mr. Bank's office by Mr. Long and Mister — and Captain Powell.

And they informed me that I had been demoted; and that my salary had been decreased.

A. All right.

Could you tell me you state of mind at that time?

A. Well, when he told me that, well, I asked him could I leave for today, you know.

[1-70]

Q. You asked who?

A. I asked Superintendent Steve Long, could I leave.

Q. Why did you ask him that?

A. Because I had stress on me, you know.

Q. Were you upset?

A. Yes, I was upset.

And Superintendent Long gave me clearance to leave.

Q. All right.

Now after — what did you do after the meeting, when you left the meeting?

A. After he gave me — requested that I could leave, I walked outside the door, and Captain Powell followed me outside the door.

Q. How close was he to you?

A. He was stepping on the hells [sic] of my shoe.

Q. What did he say to you?

A. Well, I was talking to the Control Center Officer.

I was trying to explain to her that the Superintendent had told me I could leave for the day, using comp time.

And he was hollering in my ear, saying "No, he is not taking comp time."

And kept, you know, following me and chasing me up and down.

And he asked me about the manual, sergeant manual, **[1-71]** which he had asked me earlier.

And I told time it was in my other vehicle, that I was driving my wife's vehicle, you know.

MR. GARDNER: Excuse me, Mr. Hicks. Did you say manual?

MR. OLDHAM: Sergeant manual.

MR. GARDNER: Is this a person?

MR. OLDHAM: No, no. It's a book.

QUESTIONS BY MR. OLDHAM:

Q. He had asked you about the manual that the sergeants have?

A. Yes, earlier when I first came in.

And I explained to him it was in my other vehicle,and that I didn't have it.

But he followed me outside the door.

He was trying to get me to start a fight with him, and I wouldn't.

He kept stepping on the heels of my shoe.

And I kept hollering through the window at Beverly Walter, the Control Center Officer, to let her know I had authorization to leave.

And he kept cutting me off, he wouldn't let me go out the door.

Q. All right.

What there anybody else present at that time?

[1-72]

A. Yes. Horace Williams.

Horace Williams saw him when he was trying to get me, you know, fight with him.

And Horace Williams grabbed him, and said, "Come on," he told him, you know, "he's fixing to go, so let him go out the door."

Q. Did you then leave the institution?

A. Yes.

Q. Did Captain Powell ask you to do anything in particular —

A. Yes.

Q. — with regard to a locker?

A. Yes.

He was shouting loud and belligerant [sic] for me to open my locker.

Q. Now, where was your locker?

A. My locker, I guess was about from here to the door (indicating), to the locker room.

Q. Then there is a locker room where you go inside, isn't there?

A. Yes, it is.

Q. Is that distance 60 or 70 feet?

A. Okay.

Q. Why didn't you go back to your locker room?

A. Well, I knew if I went back there, it probably [1-73] would have been a fight, because I was angry and Captain Powell was angry, too, and he kept provoking me.

Q. Were you getting hot under the collar?

A. Yes, I knew I was.

And I got clearance from Mr. Long to leave, so that's what I did.

Q. All right.

Now, there is an allegation that you invited Captain Long outside.

What is your response to that?

A. No. I didn't invite him.

I couldn't believe what he was doing.

He came to as a shock to me.

So, I asked him, I said, "Hey, you're a man and I am a man. Hey, you don't have to treat me like that, you know, treat me like a man."

Just like that.

And he kept looking at me, laughing in my face.

So, I asked him, "What are you trying to do, provoke me and make me fight you?"

And he said yes.

And during time, Horace Williams still, you know, was in between of us, because Captain Powell was so close to me, and I couldn't go out of the door, because he kept cutting me off.

[1-74]

So Horace, you know, walked me out of the door.

Q. Did you come close to blows at that time?

A. Yes, we did.

Q. But you did leave without getting in any physical altercation?

A. Right.

Q. Did you raise your voice to Captain Powell when he raised his voice to you?

A. No. I didn't.

Q. Okay.

But there was some noise?

A. Yes, there was.

Q. And Mr. Williams was present during most of this?

A. Yes.

* * *

MELVIN HICKS — CROSS EXAMINATION

[1-86]

BY MR. GARDNER:

Q. Mr. Hicks, when you had the argument with Captain Powell on the day you learned of your demotion, Captain Powell directed you that day to open your locker, didn't he?

A. That was after the argument, yes, during the argument.

Q. During the argument, he gave you an order to open your locker for him?

A. That's right. Yes.

Q. And you refused to do that, is that right?

A. Before I left.

Q. Before you left, you refused to do that, didn't you?

A. No, I didn't.

Q. Did you open your locker for him?

A. No.

Q. Did Captain Powell direct you, during that argument, to tell him which locker was yours?

A. Yes.

Q. Did you tell him which locker was yours?

A. No, I didn't.

* * *

HORACE WILLIAMS — DIRECT EXAMINATION

[1-169]

HORACE WILLIAMS, PLAINTIFF'S WITNESS, SWORN:

DIRECT EXAMINATION

QUESTIONS BY MR. OLDHAM:

Q. Would you state you name, please?

A. Horace Williams.

* * *

[1-174]

Q. Mr. Williams, did you observe any difficulties that Mr. Hicks and Captain Powell were having?

A. Yes. Yes, I did.

Q. On more than one occasion, or just one occasion?

A. I recall the incident —

I recall the incident where I think Hicks had came in for a hearing that day.

And I recall that incident, because I was standing up at the Control Center at that particular time.

Q. Now, the meeting took place in Mr. Banks' office, did it not?

A. I believe it was Mr. Schultz's office at that time. It was back in the back.

I think it was Steve Long's office — if my memory **[1-175]** serves me correct.

Q. Okay. All right.

Now, when did you first become aware —

What did you first see that drew your attention to the situation?

A. I noticed Melvin coming down the hallway, and I noticed Captain Powell walking behind Melvin.

Q. How close was he to him?

A. Maybe about three or four steps behind him.

Q. All right.

A. And I could overhear a conversation, but I couldn't make out the conversation.

It appears from the distance, as they was walking toward me, that it was unpleasant conversation being taking place.

So, as Melvin approached the Control Center where I was standing, and he indicated to the person who was working the Control Center that day, to buzz him out, because he was attempting to leave the building.

Q. What did Captain Powell do when he attempted to leave the building?

A. Captain Powell proceeded outside of the — outside of the gate, into the air lock behind Melvin.

And they were standing —

Q. Was he blockin [sic] his way?

[1-176]

A. I can't say for sure.

Q. But he had to pass Melvin to get out into the other area?

A. It's a narrow area. It's a pretty small area.

So, he would have to pass in order to get out.

Q. All right.

Just describe what transpired at that time, what you heard.

Well, could you hear what they were saying at that point?

A. I overheard Melvin say to the person who was working in the Control Center to sign him out.

And Captain Powell indicated to the individual who was working in there to sign him out on some other kind of leave.

I don't recall the leave that Captain Powell said.

But Melvin said, "No, sign me out on — sign me out, because I am going home sick," or under stress or something to that point.

And Captain Powell indicated something to Melvin as to supervisors manual.

And Melvin indicated that was in his locker.

And Captain Powell was asking — they was going back and forth about the manual.

And Melvin also indicated that was in his locker. [1-177] So they went on about that.

So, at that time, at that time I think Melvin indicated something again to the Control Center.

And so I think Melvin made the statement to Captain Powell that, you know, if he was a man that man didn't solve their problems like this.

So, I could see the situation was getting out of hand. So I indicated to Melvin, "Come on, let's go on outside of the building before things get worse."

Q. Did you then grab ahold of Melvin, and escort him out?

A. Yes, I did.

Q. Okay.

Did Captain Powell raise his voice during this period of time, or could you describe his tone of voice?

A. It was loud. Both of them was kind of loud.

Q. Okay.

Did you hear Mr. Hicks make any threats to Mister — to Captain Powell there, saying they were both men they ought to settle it something like men, something like that?

MR. GARDNER: Objection. It calls for a conclusion of what a threat is.

THE COURT: I think he posed what he thought about it, the question itself.

[1-178]

Why don't you rephrase your question?

MR. OLDHAM: All right.

QUESTIONS BY MR. OLDHAM:

Q. Have you told us everything you can remember about what was said between the parties?

A. Yes, I have.

Q. All right.

You were concerned that there might possibly be some physical altercation at this point, it that correct?

A. True.

Q. Did Mr. Hicks then leave?

A. Yes, he did.

* * *

HORACE WILLIAMS — CROSS EXAMINATION

[1-181]

QUESTIONS BY MR. GARDNER:

* * *

Q. Mr. Williams, you testified before a hearing **[1-182]** officer of the Missouri Personnel Advisory Board in an appeal that Mr. Hicks brought of his demotion and his dismissal, didn't you?

A. Yes, I did.

* * *

MR. GARDNER: The document I am using is the transcript of the Personnel Advisory Hearing, which is Defendant Long Summary Judgment Motion Exhibit C.

[1-183]

THE COURT: Then I suggest that you read the question that was asked of him, and the answer that was given.

QUESTIONS BY MR. GARDNER:

Q. It was page 162, line 2, actually the last line of page 161.

Do you remember being asked the question:

"Did you hear any threats made or anything by Mr. Hicks towards Captain Powell?"

And do you remember giving the answer:

"What I heard was that Melvin stated to him that, 'He was a man, and that men didn't settle their differences or problems that way,' something to that effect"?

A. Yes, I did.

Q. You testified that way?

A. Yes, I did.

Q. Okay.

You also testified at the Disciplinary Board Hearing at St. Mary's Honor Center now, concerning the incident between Mr. Hicks and Mr. Powell on May 9, 1984. Do you remember testifying there?

A. I can't recall, but if —

Q. Let me ask you this:

Do you remember being questioned by anyone at St. **[1-184]** Mary's Honor Center whether Mr. Hicks made this statement to Mr. Powell:

"Any time you feel like a man, just step out in the street."

A. I can't recall.

Q. Okay.

The room in which the meeting was had before the confrontation, wasn't it right outside the Control Center?

A. I can't recall.

When I noticed Melvin and Captain Powell, they was coming down the hallway.

Q. Okay.

Did you see Mr. Hicks stepping on any heels — or Mr. Powell stepping on Mr. Hicks' heels?

A. He was about three to four steps behind him.

No I did not see him stepping on any heels.

Q. Didn't see any physical contact between the men?

A. No, I did not.

Q. Okay.

You heard, I take it, Mr. Hicks say that the manual was in his locker?

A. Yes, I did.

Q. Okay.

Did you hear Captain Powell ask him to open his locker for him?

[1-185]

A. Yes, I did.

Q. Did Sergeant Hicks comply with the request?

A. No, he did not.

Q. Did you hear Captain Powell ask Mr. Hicks to point out which locker was his?

A. He may have. I didn't hear it.

Q. Okay.

Did you see Sergeant Hicks point out any locker that he said was his?

A. No, I did not.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing.)

VOLUME 2
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE STEPHEN N. LIMBAUGH

* * *

JOHN POWELL — DIRECT EXAMINATION

[2-3]

* * *

JOHN POWELL DEFENDANT'S WITNESS, SWORN:

DIRECT EXAMINATION

QUESTIONS BY MR. GARDNER:

Q. State your name, please.

A. John Powell.

* * *

[2-14]

* * *

QUESTIONS BY MR. GARDNER:

Q. I am going to show you M and N, and identify M and N for me.

A. M is a directive from Sergeant Melvin Hicks to me, dated February 27, 1984, regarding his shift change.

Q. Did Mr. Hicks make a request in the directive?

A. Yes, he did.

He requested that he and Sergeant Wilson be allowed to switch shifts.

Q. Okay.

What is Exhibit N?

A. Exhibit N is a directive from me to Sergeant Melvin [2-15] Hicks regarding his shift change request.

It's dated February 28, 1984.

Q. And how did you respond to Mr. Hicks' request for a shift change?

A. Well, I had to deny his request to trade.

It was Superintendent Long's feelings that each Shift Commander would rotate.

And this was to give them knowledge of the complete responsibilities of the institution, as well as give each subordinate officer a change to work with each supervisor to gain the full benefit of all knowledge from the supervisors.

* * *

[2-32]

Captain Powell, I want to ask you about April 27, 1984, a meeting concerning Mr. Hicks' demotion.

Did you have a meeting with Mr. HIcks and any other people concerning his demotion?

A. Yes.

I was present in Assistant Superintendent Vincent Banks' office when Superintendent Long, who was also present, informed Mr. Hicks of his demotion.

Q. Okay.

What was Mr. Hicks' reaction?

A. Schucks. He became withdrawn.

Q. Did he make a request at that time?

A. Yes, he did.

Q. What was it?

A. He requested that he be allowed to go home, as he didn't think he would be able to perform his duties.

Q. Okay.

Did anyone authorize him to do so?

A. Mr. Long authorized him to leave.

Q. Okay.

And then did Mr. Hicks leave?

A. Yes, he did.

Q. What did you do after that?

A. Upon him leaving the room, I realized that he had the Shift Commanders manual that we would need for his [2-33] relief or replacement, what have you.

The relief would need that to perform their duties.

It would have the post orders, it would have had the rosters, time and attendance reports, and everything that they would need to perform the duties of their shift.

Q. Once you realized he had that manual, what did you do?

A. I left Mr. Banks' office, and went out to where Mr. Hicks was standing at the Control Center, and asked him if I could get the manual.

Q. And what was his reply?

A. He became hostile; wanted to argue about it.

And stated he didn't have the manual, and wasn't going to give me the manual.

He was very loud with it.

Q. Okay.

Did you ask to — ask Mr. Hicks to open his locker for you?

A. Yes, I did.

Q. Why did you do that?

A. Because the Shift Commanders kept their manuals in the locker.

Sergeant Hicks had kept his manual in the locker, as I had seen him take it out of the locker many times.

Q. Okay.

[2-34]

A. He would go to the locker, and he would come back with it.

Now, I didn't see which locker at the time that he kept it in.

But I do know he would go to the locker area, and he would come back with the manual.

Q. Did he open his locker for you?

A. No, he did not.

Q. Okay.

Did you ask him which locker was his?

A. Yes, I did.

Q. Did he tell you?

A. No, he did not.

Q. Okay.

Did you ever get the shift manual from Sergeant Hicks that day?

A. No, I did not.

Q. Okay.

Did you ever look in the lockers for the shift manual that day?

A. Yes, sir, I did.

Q. How did you get in the lockers?

A. We had to cut the locks on some of the lockers.

At the time the lockers were issued to the staff, they were instructed that should they put a personal **[2-35]** padlock on that, they would provide the institution with a key, so that we could periodically inspect all lockers, which was a policy of the department.

Q. Okay.

Did you find the shift manual after your search?

A. No, I did not.

Q. Okay.

Was anybody present with you at the Control Center when you had the discussion about the lockers?

A. The Control Center officer, which was Waller, I believe, Beverly Waller.

There were some inmates standing around, and I believe Mr. Horace Williams was standing over by the stairwell.

Q. Mr. Hicks angry?

A. Yes, he was.

Q. Were you angry?

A. No, I wasn't.

I was upset that he would not give me the manual.

As far as being angry, no, I was not.

Q. Was he loud?

A. Yes, sir, he was.

Q. Were you loud?

A. No, sir.

Q. Okay.

[2-36]

Mr. Hicks make a statement to you that you took exception to?

A. Yes, sir, he did.

Q. What did he say?

A. He wanted me to go out to the street with him.

Q. Okay.

What happened after that statement was made?

A. I told him that that could be misconstrued as a threat.

And he left the institution then, so —

Q. Was there any conversation about what type of leave he should sign out under?

A. He told the Control Center officer to sign out that he was sick, that he was under too much stress.

I believe that was all that was said on that.

Q. Okay.

Did you say anything about the type of leave he should sign out under?

A. No, I did not.

Q. Did any of this discussion occur further down the hallway?

A. It started at the front of the Control Center, and then Mr. Hicks moved around to the side to actually sign out.

And that's when he told me that he wanted me to [2-37] step outside with him.

And I went to him and told him that that can be misconstrued as a threat.

* * *

[2-39]

* * *

I am going to show you Plaintiff's Exhibits 4 and 5, and ask if you have seen them before.

A. Yes, I did.

Q. Okay.

They are concerning Treglown and Perkins wanting to change shifts?

A. Yes, sir.

Q. Okay.

What were their ranks?

A. They were Corrections Officer 1's.

A. And did you permit those people to change shifts?

A. Yes, I did.

[2-40]

Q. Why is that?

A. As Corrections Officer 1's, in their positions, Superintendent Long felt that that would be permitted, should they have reason to need a specific shift or duty hours, and there was another person of the same rank willing to trade duty responsibilities, duty shifts, that he felt that we could allow that.

Q. Was there anybody of Segeant Hicks' rank who could change shifts with him?

A. I believe he requested to change with Sergeant Wilson.

I don't recall Sergeant Wilson submitted anything that he wanted to trade.

Q. Okay.

And if he wanted to trade, would the trade have been allowed even?

A. No, sir.

Q. Why is that, again?

A. Again, Superintendent Long had states that he wanted the Shift Supervisors to rotate on a regular basis, so that they would all have a full knowledge of the entire institution on a 24-hour basis.

And it would also allow their subordinates to gain the knowledge of each one of the supervisors.

* * *

JOHN POWELL — CROSS-EXAMINATION

QUESTIONS BY MR. OLDHAM:

[2-82]

* * *

Q. Let me ask you about if a Correctional Officer 1 curses the Staff Commander, would that be a violation of anything?

A. It would be insubordination.

Q. All right.

What is the penalty for insubordination?

A. That can range, depending on the circumstances involved, from verbal on up to time off.

Q. For example, if a Correctional Officer 1 used the term mother fucker, and fuck you to a Staff Commander, would that be considered to be an insubordinate activity.

A. If it proved to be a fact, yes.

Q. All right.

You received this complaint, did you not?

[2-83]

A. Yes, sir, I did.

Q. And did you conduct an investigation?

A. In that I spoke with Officer Turney. I checked his past performance appraisal.

I checked over the performance appraisal that Sergeant Hicks had submitted to him.

And from that investigation, I determined that, indeed, it didn't match.

Q. Well, I am talking about not what the service rating, I am talking about the verbal abuse or verbal statements.

A. Okay.

And per Officer Turney, he had stated he wasn't going to sign the goddamn thing.

Q. Okay.

A. Okay.

So, now you have —

Q. So, there was a dispute as to what occurred, is that right?

A. Yes, sir.

Q. In a situation like that, under a custody situation like you have, a chain of command and so on and so forth, do you support your Shift Commander, or do you support the subordinate?

A. That depends on the circumstances involved, and as [2-84] to who is actually instigating the situation.

Q. Did you determine that Officer Hicks had instigated a situation?

A. I felt that with the appraisal that he submitted to Officer Turney, yes, he did.

Q. All right.

A. It did provoke him some.

Q. So the fact that Officer Hicks provoked him by writing something on the evaluation that didn't make it as high as he thought it would be, or something like that, was sufficient grounds for the reaction that he had?

A. For him to make the statement, "I am not going to sign the goddamn thing," yes, I probably would have said the same thing.

But that isn't cursing the supervisor.

Q. So, if a superior provokes the situation, that has to be taken into consideration?

A. Yes, sir.

Q. All right.

Now, let me get to your situation with Mr. Hicks.

A. All right, sir.

Q. Now, you stated that Mr. Hicks was called in and demoted on April the 27th?

A. Yes, sir.

Q. That that time, you gave him a new post order for — [2-85] as a Custodial Officer 1, did you not?

A. I believe that was on the same date.

Q. Okay.

And did that custodial order assign him custodial duties?

A. Yes, sir.

Q. Now, that had never been assigned to a front door officer before, had it?

A. No, it didn't, it hadn't.

Q. This is brand new for Officer Hicks, wasn't it?

A. Yes, sir.

Q. All right.

Now, here we have a person who has been a sergeant for four or five years, four years, who had a good record prior to your appearance, and you assign him menial duties.

Isn't that what happened?

A. Yes, sir.

Q. And you indicated that you knew Officer Hicks was disturbed and upset?

A. Yes, sir.

Q. And he asked for permission to go home, because of the fact that he was emotionally disturbed?

A. Yes, sir.

Q. And you were aware of that?

[2-86]

A. Yes, sir.

Q. And you were aware that he was given permission to leave?

A. Yes, sir.

Q. And yet you followed him out as he was leaving?

A. Yes, sir.

Q. Your testimony is that you spoke in a quiet, soft voice?

A. Yes, sir.

Q. Did nothing to provoke him, other than just quietly ask him for his manual?

A. That is true, sir.

Q. I think you testified on direct examination to seeing Mr. Hicks get the manual out of his locker.

And then you changed that?

A. Yes, sir, I did change that.

I have never seen him in his specific locker.

What I have seen — or had seen in the past, was him go back to the locker area, and then come back with his manual for conducting —

Q. Actually, didn't he carry that manual back and forth with him all the time?

A. Not to my recollection.

Q. All right.

Anyway, he was trying to sign out, and you moved [2-87] around in front of him, and talked to him, didn't you?

A. I moved around to position myself between him and the inmate that were available, because I didn't want them involved in the situation.

Q. He was going out the door, wasn't he?

A. He was in the front of the Control Center.

Q. And he was getting ready to go out the door?

A. He would have had to come from this side around to this side, to finish signing out, and go out the door.

Q. All right.

So you got in between him en route, didn't you?

A. Yes. There was inmates that was standing back by the stairwell there.

So, I was behind him —

Q. If you let him go on out, he would have gone, isn't that true?

A. That is true.

Q. And you say you didn't think that was any action of provoking a situation —

A. No sir.

I did not leave that office to provoke Sergeant Hicks.

Q. You knew that there had been difficulties between you and Officer Hicks, had been for some time, since March?

[2-88]

A. I can't say that there was difficulties between he and I.

At no time was there any kind of personal —

* * *

[2-99]

* * *

STEVEN LONG — DIRECT EXAMINATION

QUESTIONS BY MR. GARDNER:

Q. Please state your name for the record, sir.

A. Steve Long.

Q. Mr. Long, how are you employed at this time?

A. I am the Assistant Director, Division of Adult Institutions, Department of Corrections.

Q. For the State of Missouri?

A. That's correct.

Q. When did you become the Assistant Director?

A. About four years ago.

Q. Okay.

And that would put us back to 1986?

A. Right. I believe September of '86, August of '86.

Q. Prior to September of 1986, were you employed with the Department of Corrections?

A. Yes, sir.

Q. And what capacity?

Immediately prior to that.

[2-100]

A. Most immediately prior, I was Superintendent of the Farmington Correctional Center.

Q. And prior to Superintendent at Farmington, were you employed with the Department in any way?

A. I was the Superintendent of the Missouri Eastern Correctional Center.

MR. OLDHAM: Superintendent of what?

THE WITNESS: Missouri Eastern Correctional Center.

QUESTIONS BY MR. GARDNER:

Q. And prior to the Superintendent there, were you employed with the Department in any way?

A. Yes.

Superintendent at St. Mary's Honor Center.

Q. What period of time were you the Superintendent at St. Mary's Honor Center?

A. From, I believe it was January of '84 to mid '85.

* * *

STEVEN LONG — CROSS-EXAMINATION

QUESTIONS BY MR. OLDHAM:

[2-151]

* * *

Q. Who was the Shift Commander when this fellow, Lee, escaped?

A. I am not sure, sir.

Q. Could I refresh your memory that it was Sharon Hefele, would that refresh your memory at all?

A. It is very possible.

I know she was there at the time of the escape.

Q. That was her regular shift, wasn't it?

A. I think it was her shift at that time.

Q. Pardon?

A. I think it was her shift at that time.

Q. During this period of time, how often did you rotate shifts?

[2-152]

A. I don't think we had a formal rotation period.

Q. You didn't?

A. I don't recall one.

* * *

[2-175]

GEORGE LOMBARDI — DIRECT EXAMINATION

* * *

QUESTIONS BY MR. GARDNER:

Q. Would you state your name for the record, please?

A. George Lombardi.

Q. Mr. Lombardi, how are you employed at this time?

A. I am employed with the Department of Corrections.

Q. In what capacity?

A. I am Director of the Division of Adult Institutions.

Q. How long have you held that position, and when did you begin holding it?

A. I began the position in June 1986.

Q. Okay.

Prior to that time, did you have a position with the Department of Corrections?

A. Yes.

Q. What was that position?

A. I was Assistant Director of the Division of Adult **[2-176]** Institutions.

Q. And when did you begin holding that position?

A. In April 1983.

Q. And as Assistant Director of the Division of Adult Institutions, tell us your duties.

A. My duty was to supervise, I believe, seven or eight of the state penal institutions in the Division of Adult Institutions.

Q. Okay.

Was St. Mary's Honor Center one of them?

A. Yes, it was.

* * *

[2-197]

* * *

GEORGE LOMBARDI — CROSS-EXAMINATION

QUESTIONS BY MR. OLDHAM:

Q. Mr. Lombardi, isn't is true that you were at Tipton at one time or another?

A. Yes.

Q. Isn't is true that Mr. Davis was up there writing this report?

Mr. Davis was up there at your facility, studying the facility, while you were there?

A. No.

Q. It's not true?

A. Not to my knowledge.

Q. If he were there, you would know about it, wouldn't you?

A. If I was there and he was there, I would have known about it.

Q. What period of time were you at Tipton?

A. November 1976 to August 1979.

* * *

[2-202]

* * *

You came down here I guess in September, October of 1983 to investigate the situation?

A. In late 1983.

Q. Right.

And you were disturbed about the way Mr. Schulte was running the institution?

A. Yes.

Q. He was the chief officer down here, wasn't he?

A. Yes, he was.

Q. Wasn't he the one that would be responsible for any difficulties?

Wasn't that his responsibility as the Superintendent at the institution?

A. The Superintendent is ultimately responsible for the management of his facility.

Q. All right.

And did you sit in on any Disciplinary Boards in December and January?

Did you sit in on any of the Disciplinary Boards in December and January, when there were firing a bunch of people?

A. No.

Q. Now, as I remember, Mr. Schulte was demoted and transferred, right?

[2-203]

A. That's correct.

* * *

[2-204]

As a Superintendent, you're more responsible for that institution than the Correctional Officer?

A. I think your span of control over the operation is certainly greater.

Q. All right.

And it was the control of the operation that concerned you, wasn't it?

A. Are you talking about now Mr. Schulte —

Q. Yes, during Mr. Schulte's period.

A. Certainly.

Q. You had meetings with him, didn't you?

A. Yes.

Q. And you told him of things that you wanted done, and you wanted corrected?

A. Yes.

Q. And you gave him a period of time to make those corrections, didn't you?

A. Yes.

Q. And after a period of time, he hadn't made those corrections?

A. Correct.

Q. And you had another meeting with him, and stressed upon him the seriousness of the situation?

A. Yes.

Q. And you came back again on an unannounced visit, **[2-205]** and nothing had improved?

A. Yes.

Q. And you then made recommendations for disciplinary action, didn't you?

A. I made recommendations that that consideration be given to disciplinary action.

Q. Okay.

And who did you make those recommendations to?

A. To the Director of the Division of Adult Institutions, Donald Wyrick.

Q. That would be Mr. Wyrick at that time?

A. Yes.

Q. And he was the person that had the responsibility for making the final decision?

A. Correct.

Q. Would it be fair to say that Mr. Schulte had let the institution go to pot?

A. In the areas I mentioned.

Q. Okay.

And after he was warned, given two warnings, and told to correct it, and hadn't corrected it, and finally disciplinary action was taken?

A. That's true.

Q. Would it be fair to say that you advised him that if he didn't make these corrections, that something would [2-206] be done about it?

A. I am sure those terms were either inferred or implied.

Q. All right.

And isn't that what your disciplinary action calls for?

A. Excuse me?

Q. Your disciplinary procedures call for him to be notified that if something is wrong, he should correct it; if he doesn't correct it, then disciplinary action will be taken?

A. There is nothing specific that says that a person must be notified.

Q. Okay.

Q. But at least you notified Mr. Schulte about the problems?

A. Yes.

Q. And you gave him two opportunities to correct it?

A. That's true.

Q. And when he didn't, then you demoted him and transferred him.

Did he lose any salary as a result of that, do you know?

A. Yes.

Q. He still works for the Division of Corrections?

[2-207]

A. Yes.

Q. Where is he now?

A. He is Assistant Superintendent of the Fulton Reception and Diagnostic Center.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing.)

VOLUME 3
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE STEPHEN N. LIMBAUGH

* * *

[3-2]

* * *

VINCENT BANKS — DIRECT EXAMINATION

VINCENT A. BANKS, PLAINTIFF'S WITNESS, SWORN:

DIRECT EXAMINATION

QUESTIONS BY MR. OLDHAM:

Q. Would you state your name, please?

A. Vincent A. Banks.

Q. Mr. Banks, where are you employed?

A. St. Mary's Honor Center.

Q. What is your position there?

A. Superintendent.

Q. How long have you been Superintendent at St. Mary's Honor Center?

[3-3]

A. Since October 1985.

Q. Prior to that, where did you work?

A. St. Mary's Honor Center.

Q. How long have you been at St. Mary's Honor Center?

A. April 1st, 1978.

Q. Up until the present time, then.

What positions have you held at the Honor Center?

A. Assistant Superintendent and Superintendent.

Q. So that you have been either Assistant Superintendent or the Superintendent since 1978?

A. Yes, sir.

* * *

[3-13]

* * *

Q. Now, do you have a roster with you from April of '84?

A. Right.

Q. All right.

Is this a roster prepared by who, if you know?

A. Captain John Powell.

Q. Okay.

And this would be in custody only, right?

A. Right.

Q. Could you read down the list, and tell me what happened, give the race, and tell me what happened to each one of these?

[3-14]

* * *

THE WITNESS: Well, the first name, John Powell was the captain.

Sharon Hefele was a sergeant.

Melvin Hicks was a sergeant.

QUESTIONS BY MR. OLDHAM:

Q. I need you to give the race.

A. Okay, I am sorry.

John Powell, white.

Q. What happened to Mr. Powell?

A. He transferred to Pacific, from Pacific, he is a captain now down in Potosi.

Q. Next person?

A. Sharon Hefele, white.

Q. What happened to her?

A. She's a captain down in Farmington.

Q. She transferred to Farmington.

Next person?

A. Melvin Hicks, CO-2.

Q. He is black?

[3-15]

A. Black.

Q. What happened to him?

A. He was terminated.

Q. Next person.

A. James Wilson.

Q. He is white?

A. White. CO-2.

He was transferred.

He was recommended to be terminated, but because of his number of years, about 15 years, he was not terminated at that time.

He was transferred to MSP.

Q. What was Mr. Wilson's problem.

I mean you said there was a recommendation for termination, but he wasn't terminated.

A. He was a problem at the institution.

Q. He was what?

A. Personal problems.

He got involved with other inmates and other staff.

Q. Okay.

How about Mister — who is the next one?

A. George Ackles.

Q. What race is he?

A. Black.

Q. What happened to him?

[3-16]

A. He was terminated.

Q. The next person?

A. George Baker. Black.

Q. What happened to him?

A. Terminated.

Q. Next person.

A. Paul Crowe.

Q. What race?

A. White.

Q. Where is he?

A. If I am not mistaken, he is at Farmington, a lieutenant down at Farmington.

Q. Next person?

A. Jimmy Davis.

Q. What race?

A. Black.

Q. What happened to him?

A. Got fired.

Q. Next person?

A. Michael Doss.

Q. What race?

A. White.

Q. What happened to him?

A. He resigned.

Q. He resigned.

[3-17]

How about the next one?

A. George Evans.

Q. What race?

A. He had a stroke and died?

Q. Was he white?

A. White.

Q. Okay.

Next person?

A. William Garrett.

Q. What race was he?

A. Black.

Q. What happened to him?

A. Resigned.

Q. He resigned.

A. He resigned.

He resigned just about a year ago.

Q. So, his resignation was something fairly recent?

A. Yes.

Q. How about the next person?

A. Charles Kennedy.

Q. What race?

A. Black.

Q. What happened to him?

A. Terminated.

Q. Next person?

[3-18]

A. Don Moore.

Q. Race?

A. Black.

Q. And where is Mr. Moore?

A. Resigned.

Works at the Chevrolet plant.

Q. Went to work at the Chevrolet plant?

A. Out at Wentzville.

Q. Okay.

Had he worked at the Chevrolet plant before?

A. No.

Q. Okay.

Next person?

A. Lee Mozee.

Q. What was his race?

A. Black.

Q. What happened to him?

A. He was promoted to Superintendent 1, and right now he is on disability.

Retired, disability.

Q. Next person:

A. Curtis Perkins.

Black.

Transferred.

Q. Next person?

[3-19]

A. Edward Ratliff.

Q. What happened to him:

A. He is at Pacific.

Lieutenant.

Q. He was white?

A. White male.

Q. He was promoted to lieutenant?

A. Through the ranks.

Q. Next person?

A. Frank Slinkard.

Q. Is he white?

A. White.

Q. What happened to him?

A. He resigned.

Q. Next person.

A. Donald Smith. Black.

He is still working there.

Q. All right.

Next person?

A. David Schuman. Black.

Q. What happened to him?

A. Terminated.

Q. Next one, Elvis Thomas?

A. Elvis Thomas. Black.

Q. What happened to him?

[3-20]

A. He resigned about five months ago.

Now he is asking to be reinstated to come back.

Q. Next person?

A. Don Treglown.

Q. What race is he?

A. White.

He is a sargeant[sic] down in Farmington.

Q. Mr. Turney?

A. Arthur Turney, I didn't see those papers.

You said he was terminated in '84.

White.

Q. Next person?

A. Lillian Walls.

Q. What race was she?

A. Black.

Q. What happened to her?

A. She was promoted CCA, and under my administration, we terminated her this past July.

Q. So, she remained there until July of this past year?

A. Until July of this past year.

Q. The next person, Keith Smith?

A. Black. And resigned.

Q. Next person?

A. Ron Ramey. Resigned.

[3-21]

Q. That was the custodial force?

A. That was the roster.

Q. In April of '84?

A. Right.

* * *

VINCENT BANKS — CROSS-EXAMINATION

QUESTIONS BY MR. GARDNER:

* * *

[3-29]

As Assistant Superintendent at St. Mary's, what did your duties include?

A. At that time, over all of the food section, and classification, which was case workers and the inmates that work with these programs.

Q. Didn't include any custodial responsibilities?

A. No. That was under the Superintendent.

Q. Okay.

A. Mr. Long.

* * *

[3-46]

VINCENT BANKS — RECROSS-EXAMINATION

* * *

Q. Who is the Assistant Director of the Division of Adult Institutions now, which has the Honor Center within his —

A. As far as I know, Steve Long.

Q. Steve Long?

A. Steve Long, yes, sir.

Q. And Steve Long, has, doesn't he, now, some hiring review function for people at St. Mary's Honor Center?

A. Yes, sir.

Q. Tell me the levels of —

Well, he reviews custody people to be hired at St. Mary's Honor Center, doesn't he?

A. The CO-1s, they are hired directly out of Jefferson City central office.

Q. Does Mr. Long have any connection with hiring CO-1s?

A. Not CO-1s, no.

Q. How about CO-2s, or sergeants?

A. CO-2s and sergeants are my recommendation.

Q. Pardon me?

A. My recommendation, my recommendation only.

[3-47]

Q. To Mr. Long?

A. My recommendation, though.

Q. My question is:

Does Mr. Long have any input now in the hiring of —

A. No, not of sergeants.

Q. Okay.

What about lieutenants?

A. Lieutenants, yes.

Q. And what about captains?

A. He has to approve it.

* * *

[3-49]

* * *

Q. So, Mr. Long is aware of every hiring decision?

A. He's aware, right, except CO-1s, and clerk typists.

Q. Except CO-1s and clerk typists?

* * *

VINCENT BANKS —RE-REDIRECT EXAMINATION

QUESTIONS BY MR. OLDHAM:

Q. I am just a little bit confused.

As I understand, you're the one that recommends the CO-1s?

A. Not CO-1s.

They come directly from Jefferson City.

They have a central pool.

Q. They come directly from Jefferson City.

THE COURT: Nobody at the Honor Center has anything to do with the hirings of CO-1s?

THE WITNESS: No, sir.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

**JAMES DELBERT DAVIS —
DEPOSITION TESTIMONY**

* * *

[3]

* * *

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your name, please.

A. My name is James Delbert Davis.

* * *

[4]

* * *

Q. All right. Mr. Davis, I want to ask you some questions about a study you did of the Honor Center's program in Missouri back in 1981, and in order to do that, I need to get a little history on yourself.

* * *

[5]

* * *

Q. Where are you employed at the present time?

A. I work for the Missouri Department of Mental Health.

* * *

Q. Okay. Did you at one time work for the Department of Social Services?

A. Yes, I did.

* * *

A. At that time the corrections was a division of the Department of Social Services.

Q. Okay. What was your position?

A. I was a Planner 2.

Q. At that time:

A. Yes.

Q. Could you describe just briefly your responsibilities as a Planner 2?

A. To do research and evaluation and review [6] legislative proposals having to do with the Division.

Q. Okay. Now, did you at any time or were you at any time assigned to do an evaluation of the Honor Center's program of the Missouri Division of Corrections?

A. Yes, I was.

Q. And who assigned that to you?

A. That would have been Harvey Morton.

Q. What was his position?

A. He was the Director of State Planning.

* * *

Q. And is a Director of State Planning a high ranking position within that department?

A. It was immediately under the Division Director.

Q. And who would that be?

A. That was Dennis Eskina.

* * *

[7]

* * *

A. And Mr. Morgan worked under Mr. Eskina, and I worked under Mr. Morgan.

Q. Did you have any conversations with anybody other than Mr. Morgan at the time you were assigned to do this job?

A. It was done at the request of Mr. Riley from the Division of Corrections, and Mr. Morgan and myself discussed it with Mr. Riley and Merna Trickey.

Q. All right.

A. Mr. Riley was the Deputy Director of the Division of Corrections, and Merna Trickey worked under him.

* * *

[10]

* * *

Q. When you finished your analysis or study, who did you turn it in to?

A. Mr. Morgan.

Q. And do you know whether or not Mr. Riley every received it?

A. Yes, he did.

Q. After it was completed, did you discuss it with Mr. Riley?

A. Yes.

Q. Anybody else at a high level that you discussed it with in the Department of Corrections?

A. Mr. Morgan and Mr. Eskina and myself went to Mr. Riley's office and discussed it with him and Mr. Blackwell who, at that time, was the director of the Division of Corrections.

Q. Would this have been some time after April 15th, 1981?

A. Sometime within a month or so, I would say.

Q. All right. So it would have been probably May of 1981 that you'd met with Mr. Blackwell and Mr. Riley and Mr. Morgan and Mr. Eskina?

A. Yes.

[11]

* * *

Q. Could you tell me what was said about your evaluation by Mr. Blackwell and Mr. Riley?

A. Both said that they were happy with it, that it was—they were impressed with the detail that I'd been able to gather in a relatively short period of time and—

Q. Now, as I understand it, you spent about seven days at each of the Honor Centers?

A. Yes, uh-huh.

Q. And during that seven days, you observed the Honor Centers, and your comments and results of your observation are contained in your evaluation?

A. Yes.

Q. Do you have a copy of that evaluation with you?

A. Yes, I do.

MR. OLDHAM: Could we have it marked as Deposition Exhibit—I guess Davis Deposition Exhibit 1.

(DAVIS DEPOSITION EXHIBIT NO. 1 WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

[12]

BY MR. OLDHAM:

Q. Mr. Davis, let me hand you what's been marked as Davis Deposition Exhibit No. 1 dated 3/10/89 and ask you if you can identify that document.

A. Yes. This is the report of the process analysis that I had done.

Q. Does it contain 93 pages, plus seven pages of recommendations?

A. Yes, it does.

Q. And did you prepare this document as part of your responsibilities and duties as a Planner 2 in the Department of Social Services—

A. Yes, I did.

Q. — of the State of Missouri? And was this done in the regular course of your business and your responsibilities?

A. Yes.

* * *

Q. Can you give me an outside figure of how many copies were made?

[13]

A. How many copies were made in my office? That's all I would have knowledge of. At least I'd say probably ten or 12.

Q. Ten or 12?

A. Uh-huh.

Q. Okay. And you have indicated they were distributed to various individuals including Mr. Blackwell who was the head of the Division of Corrections at that time?

A. Yes, uh-huh.

Q. And also to Mr. Eskina who was a director of planning?

A. Yes.

Q. And to a Mr. Morgan who was also in the planning section?

A. Yes, uh-huh.

Q. Do you know whether Mr. Freeman received one?

A. I have no—

Q. Other than those individuals we've mentioned: Morgan, Eskina, Riley, and Blackwell, do you know anybody else in the Department of Corrections that received copies of this document?

A. Merna Trickey, I suppose, since she was involved in the initial request for the study, and then the superintendents of the Honor Centers.

[14]

Q. Superintendents of the various Honor Centers received various copies?

A. Uh-huh.

* * *

[15]

* * *

MR. OLDHAM: Okay. At this point I'd like to offer into evidence Deposition Exhibit No. 1.

MR. GARDNER: I'll make an objection. It's a document that is not a public record. It's not prepared under any duty to prepare it or make a report, make a public report about its contents. It also contains conclusions or matters that the jury does not need any assistance in determining.

BY MR. OLDHAM:

Q. Let me just ask you a couple of questions. Was this a document of public record which would be available to everyone or just an in-house document?

A. It was intended as an in-house document.

Q. Okay. It was for the use of people of the State of Missouri who were responsible for making plans and decisions about the Honor Center's program?

[16]

A. Yes. Management decisions.

Q. Management decisions? And it was used for that purpose?

A. Yes. Or I would have to say that it was requested for that.

* * *

Q. 1980. And the report was completed on April the 15th, 1981?

A. Yes. That's when the report was written.

[17]

Q. Okay. Now, would you go next to page 83. That page is titled "organization stability", and it talks about—let me just read this first paragraph to you. Then I want to ask you a question about it.

"An important consideration in examining any organization is the potential for (or possibility of) factions originating within the ranks which could challenge or undermine the power of executive leadership. This is particularly noteworthy whenever a group of subordinates share a common characteristic or sentiment and do not consider the head of the organization to belong in their group. (For instance, loyalty to a deposed former boss might undermine a newly appointed executive's authority. If the staff should rally together around such a shared sentiment, the potential for subterfuge and subversion clearly exists.)"

Now, why was this a part of the evaluation? Why was that paragraph a part of the evaluation?

A. Let me ask you something. You're asking me why this was written into the report?

Q. Yes.

A. By and large, this section, which is called "Organizational Stability" was just some kind of thoughts, ideas, that I was having at the time, in effect, you know, brainstorming. I had written everything down and then [18] took the report to Mr. Morgan, asked him to look at it, consider it as a draft and to give me his reaction to it, intending that we look it over and consider whether some things shouldn't be in here, this being one of the things.

Rather than that, he sent the copy on over to the Division of Corrections, and I guess what I am saying is that even at the time the report was first actually released, I had my reservations

about this section as to whether it really should have been left in here.

Q. But what you did is you prepared a draft and sent it to Mr. Morgan?

A. Yes.

Q. And then he sent it over to the Division of Corrections?

A. Yes.

Q. And as a result of that, this particular section remained in the evaluation?

A. Yes. When we met with Mr. Blackwell and Mr. Riley to review it, I suggested taking this out, and they indicated that they did not want anything changed.

Q. Okay. So Mr. Riley and Mr. Blackwell both had knowledge of this before it went into the final section and apparently approved it. Would that be an accurate statement?

[19]

MR. GARDNER: I'll object to the form of the question. It's leading.

BY MR. OLDHAM:

Q. All right. Did Mr. Blackwell and Mr. Riley ask that this be removed?

A. No.

Q. Did they ask that it remain?

A. Not that they asked that it remained. It was that I made a suggestion that it not remain, and their response was that they saw no reason why it should be taken out.

Q. Okay. You note here that in St. Louis, however, ethnic differences can be seen or imagined as a potential for organizational disruption. What were the ethnic differences that you were talking about?

A. At the time I was there when I spent the week there, there were quite a few references among the staff to, you know, black/white conflict.

Q. Now, when you say the staff, what staff are you talking about?

A. Prominently the correctional services, sargeants[sic] and unit—

Q. Would these be the white services or the black services.

A. Both.

[20]

* * *

Q. All right. On page 85, you did a breakdown of the blacks and whites at Kansas City and St. Louis and showed how power was shared between the two groups; is that correct?

A. Yes.

* * *

[21]

* * *

Q. And you note that in St. Louis, whites own—controlled only 38.62 percent of the decision-making power using your analysis?

A. Yes.

* * *

[29]

Q. Do you know what was done with this report?

A. No, I do not.

Q. Okay. Let me ask you a few more questions and I think I'll be done.

Is Mr. Morgan white or black?

A. White.

Q. Mr. Freedom, was he white or black?

A. White.

Q. Mr. Barrett Toan, was he—

A. White.

Q. Mr. Dennis Eskina?

A. White.

Q. Dale Riley?

A. White.

Q. Merna Trickey?

A. White.

Q. Mr. Blackwell?

A. White.

Q. And what is your race?

A. White.

* * *

* * *

[30]

CROSS-EXAMINATION BY MR. GARDNER:

* * *

[54]

* * *

Q. Okay. Now, let's go to page 88, if we could. You mentioned that you had some reservations about the organizational stability portion of your report of which page 88 is a part of, it being published or a part of the report being published. What kind of reservations did you have?

A. Just as I said it had actually come into existence just as some ideas that I was sketching down — wrote — have always had doubts as to whether it is actually worth much in terms of help to anyone in the managment position as far as making decisions as to how to run an organization, and it really probably more wisely shouldn't have even been included in the report.

Q. You didn't find any actual subversion of the superintendent's power at the Honor Center, did you?

A. Not really, no.

Q. And you didn't find any racial polarization there, did you?

A. Not that bad, no.

Q. Okay. On page 88, you say that "Perhaps it [55] could be said that the choice of functional unit management as an organization approach is the superintendent's response to this reality." By "reality", you meant the —

A. 38 percent of power held by whites.

Q. Okay. And this was an explanation for the presence of the records officer in the control center in your mind, I take it?

A. It was in my mind. This was a product of a struggle that I was having trying to come to something which could explain the assignment of the control center operation to the records officer.

Q. And also having two white caseworkers as unit managers?

A. Yes, uh-huh.

Q. Okay. Did Mr. Schulte tell you that this caseworkers system and the records officer location was his response to the reality?

A. No.

Q. Okay. Do you know if it was Mr. Schulte who implemented the functional unit management system there?

A. Yes, it was.

Q. Okay.

A. I might add Mr. Schulte and I never discussed racial concerns in this organization at all.

* * *

DAVIS DEPOSITION EXHIBIT 1

EVALUATION OF THE
MISSOURI DIVISION OF CORRECTIONS'
HONOR CENTERS PROGRAM:

PART ONE

PROCESS ANALYSIS

JAMES D. DAVIS

MISSOURI DEPARTMENT OF SOCIAL SERVICES
DIVISION OF PLANNING AND BUDGET

JEFFERSON CITY, MISSOURI
APRIL 15, 198

ORGANIZATIONAL STABILITY

An important consideration, in examining any organization, is the potential for (or possibility of) factions originating within the ranks which could challenge or undermine the power of executive leadership. This is particularly noteworthy whenever a group of subordinates share a common characteristic or sentiment and do not consider the head of the organization to belong in their group. (For instance, loyalty to a deposed former boss might undermine a newly appointed executive's authority. If the staff should rally together around such a shared sentiment, the potential for subterfuge and subversion clearly exists.)

In Kansas City, a considerable portion of the casework staff formerly worked together at the Community Services Unit, of the Division of Corrections. Since the Superintendent, himself, is a part of that group, the potential for unified staff opposition against the power of the Superintendent in minimal.

In St. Louis, however, ethnic differences can be seen - or imagined - as a potential for organization disruption.

The following charts will illustrate this.

Excluding Food Service, Maintenance, Property Control, and Clerical Staff, both organizations have six levels of power among those who bear the responsibility of making decisions regarding (1) official entries into an inmate's case record, (2) employees personnel files, and (3) institutional policies.

KANSAS CITY	ST. LOUIS
6. Superintendent	6. Superintendent
5. Asst. Supt., Bus. Manager	5. Assistant Superintendent
4. Custody Chief, Activities Coordinator, Caseworkers, Records Officer	4. Records Officer, Activities Coordinator, Unit Managers, Business Managers
3. Accounts Clerk, Classification Assistants	3. Accounts Clerk, Unit Officers, Work Release Officers
2. Sergeants	2. Sergeants
1. Line Correctional Officers	1. Line Correctional Officers

NOTE: For Illustrative Purposes only. Not to be construed as entirely accurate.

The Distribution of Whites and Blacks across these levels is:

KANSAS CITY

6. W
5. W W
4. B W B W B
3. W B W
2. W B W B W W
1. W B W B W B W B W B W B W B W B

ST. LOUIS

6. W
5. B
4. W W B W W
3. B B B B B B B
2. B B B
1. B B B B B B B B B W B B B B B W B B B B B

Now, by assuming that the superintendent (level six) holds six shares of power, the next level holds five shares of power, the next level has four shares, etc., we find the following.

1. There are 21 shares of power (1+2+3+4+5+6 = 21)

2. At level one:

In Kansas City, 16 correctional officers divide one share of power. Each holds 0.062 shares. There are eight Whites in this level for a combined (8 x 0.062) power potential of 0.5 shares.

In St. Louis, 18 correctional officers divide one share of power. Each holds 0.56 shares. There are two Whites in this level for a combined (2 x 0.056) power potential of 0.11 shares.

3. At Level Two,

In Kansas City, six sergeants divide two shares of power. Each holds 0.33 shares. There are four Whites in this level for a combined (4 x 0.33) power of potential of 1.33 shares.

In St. Louis, there are no white sergeants. The Whites possess none of the power at this level.

4. At Level Three

In Kansas City, three people divide three shares of power. Each

holds 1.00 shares. There two Whites for a combined power potential of 2.00 shares.

In St. Louis, there are no Whites at this level.

5. At Level Four

In Kansas City, five persons divide four shares of power. Each holds 0.80 shares. There are two Whites in this level for a combined power potential (2 x 0.80) of 1.6 shares.

In St. Louis, five persons divide four shares of power. Each holds 0.8 shares. There are four whites in this level, for a combined (4 x 0.80) power potential of 2.0 shares.

6. At Level Five

In Kansas City, two people divide five shares of power. Both are white.

In St. Louis, one Black holds all five shares of power.

7. At level Six

At both centers the Superintendent is white.

The total shares of power held by Whites in each organization, then, is

KANSAS CITY		ST. LOUIS	
Level 1	0.50	Level 1	0.11
2	1.33	2	0.00
3	2.00	3	0.00
4	1.60	4	2.00
5	5.00	5	0.00
6	6.00	6	6.00
Total	16.43		8.11

Therefore, following this illustration, it could be said that Whites at Kansas City control 78.24% (16.43 divided by 21) of the power. At St. Louis, however, Whites control only 38.62% (8.11 divided by 21) of the decision making power.

In Kansas City, executive positions are monopolized by Whites in the top Two levels, where 52.38% of the total power [(6+5) divided by 21] is concentrated.

The Ka-Cee Superintendent holds 28.57% of the power, while the two persons on the next lowest level hold 11.90% each. Neither of them is in any position to threaten his authority.

In St. Louis, executive positions are racially balanced (one White and one Black). Since (1) the majority of the program staff (63.64%) is black, (2) the Superintendent is white, and (3) the Assistant Superintendent is black, the potential for subversion of the Superintendent's power - should the staff become racially polarized - is very real.

Perhaps it could be said that the choice of Functional Unit Management as an organizational approach is the Superintendent's response to this reality. By this approach, the Superintendent has elevated two caseworkers (both white) to the job title of Unit Manager and has placed the Records Officer (a white) to the job title of Unit Manager and has placed the Records Officer (a white) over the control center. But, unit management grants for more power to Blacks than it detracts. If St. Mary's was organized similarly to Ka-Cee (which one could visualize by elevating the Business Manager to an executive position [level 5], changing unit managers to caseworkers and work release officers to casework assistants, and then making unit officers into sergeants) one would find Whites controlling 55.29% of the power.

PLAINTIFF'S EXHIBIT 7

TO: Capt. John Powell, Chief of Custody

From: Sgt. Melvin Hicks, 1st shift Sgt. /s/ Melvin Hicks

Subject: Unauthorized Firearm (7:15-7:30 a.m.)

On February 4, 1984; Sgt. Hicks and COI Doss, were finished the count, when they observed COI Edward Ratliff buzz the front door of S.M.H.C. to let a Deputy Marshall into the control center.

The Deputy Marshal was wearing his pistol hanging from his right side. Sgt. Hicks reactions were that the Deputy Marshal was entering the control center to serve a warrant to one of the residents, upon entering the control center the Deputy Marshal asked "shall I check my gun?" Whereas COI Ratliff, who was not officially on duty stated that "No that's alright, he's my brother." They begin to hold a conversation in the control center, then preceed to the Captain's office while the Deputy Marshal was still armed.

Residents were moving to the control center and hallways in order to sign out for work and report to the kitchen.

COI Ratliff and his brother entered Captain Powell's office, about 15 feet away from the control center with the unauthorized firearm still attached to the Deputy's side. Officer Ratliff sat in the Captain's seat, behind his desk while his brother sat across from him in a office chair. SGt. Hicks called COI Ratliff outside the office and ordered him to get his brother of of S.M.H.C. with that gun. COI Ratliff replied "that's alright, officers will be getting guns soon anyway," COI Ratliff is aware that all unauthorized weapons are keep in a designated area. Sgt. Hicks then told COI Ratliff that he would receive a write-up for his actions. COI Ratliff answered Sgt. Hicks by saying, "That's on you Buddy." COI Ratliff then went back into Capt. Powell's office and continued to hold his previous conversation ignoring Sgt. Hicks orders altogether.

At 7:30 a.m., COI Ratliff's brother departed from the center by leaving the Captain's office and preceeding toward the front door with COI Ratliff following to his left, they stopped at the front door and continued their conversation.

Residents were still moving around, about this time, the following officers were also presence at this time too.

1. Front doorman-Charles Kennedy
2. Control Center Officer-Ron Ramey
3. Conducting Count Officer-Michael Doss
4. Shift Commander-Sgt. Melvin Hicks

COI Ratliff is being charged with the following violation:

1. Allowing a firearm to enter the institution for socail purposes, without proper authorization.
2. Breach-of-Security
3. Disobeying a direct order
4. Taking matters in his own hands.

Sgt. Hicks recommendation or COI Ratliff be, that he be recommended for Disciplinary committee immediately; Before a disaster occurs. Also let us take note that COI Ratliff is still a probationer officer at S.M.H.C.

File:

F/A

PLAINTIFF'S EXHIBIT 38

MISSOURI DEPARTMENT OF CORRECTIONS
ST. MARY'S HONOR CENTER

MEMORANDUM

DATE: 4-17-84

TO: Capt. Powell

FROM: COI Melvin Hicks

/s/ Melvin Hicks

SUBJECT: COI Arthur Turney - Insubordination

April 7-84, COI Turney reported in for work at 10:30 p.m. for his shift.

Sgt.Hicks then began to discuss Officer Turney's Service rating with him; upon viewing his rating score. Officer Turney became indignant and began to curse. COI Turney's statement to Sgt. Hicks was. "I'm not going to sign that Mother Fucker and Fuck you Sgt. Hicks." For that open subordination toward a commanding officer, I recommend COI Turney be brought up on charges for immediate disciplinary action.

cc: Supt. Long
V. Banks
Capt. Powell
COI Turney
File:

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing.)

NOTICE OF APPEAL FROM AN ORDER OF A DISTRICT COURT TO THE EIGHTH CIRCUIT COURT OF APPEALS

[Filed: Feb. 28, 1991]

Notice is hereby given that Melvin Hicks, the plaintiff in the above cause of action, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final order of the District Court wherein the District Court entered judgment in favor of St. Mary's Honor Center and against plaintiff on the merits of Count I of plaintiff's complaint and also entered judgment in favor of defendant Steve Long and against plaintiff on the merits of Count III of plaintiff's complaint. Said judgments were entered on the 31st day of January, 1991.

(Subscription omitted in printing.)

(4)

Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER and STEVEN LONG,
Petitioners,

vs.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

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PETITION FOR CERTIORARI FILED OCTOBER 5, 1992
CERTIORARI GRANTED JANUARY 8, 1993

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

35+1

QUESTION PRESENTED

In a Title VII and 42 U.S.C. § 1983 action alleging unlawful discrimination, whether a judgment for the employee is compelled, as a matter of law, by a finding that the employer's legitimate, non-discriminatory reasons for adverse employment action are pretextual.

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No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER and STEVEN LONG,
Petitioners,

vs.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported at *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992), and may be found in the Appendix to the printed Petition for Writ of Certiorari ("Pet. App.") at page A-1. The Order and Memorandum of the District Court for the Eastern District of Missouri is reported at *Hicks v. St. Mary's Honor Center*, 756 F. Supp. 1244 (E.D. Mo. 1991) (Pet. App. A-13, A-14).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 23, 1992 (Pet. App. A-1). A petition for

rehearing or rehearing en banc was denied on September 3, 1992 (Pet. App. A-31). The petition for writ of certiorari was filed on October 5, 1992, and was granted on January 8, 1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1) (1988) ("Title VII"), provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988) ("§ 1983"), provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Melvin Hicks, a former supervisory employee of St. Mary's Honor Center ("St. Mary's"), a minimum security correctional facility of the Missouri Department of Corrections, brought this employment discrimination action against St. Mary's and Steven

Long, St. Mary's Superintendent.[1] Hicks, a black, alleged that his demotion and discharge were racially motivated. The district court found after trial that Hicks established a prima facie case, that St. Mary's and Long introduced evidence of legitimate, nondiscriminatory reasons for the demotion and discharge, and that Hicks proved those reasons were not the true reasons for his demotion and discharge. The district court further found, however, that Hicks did not prove by a preponderance of the evidence that his demotion and discharge were racially motivated and thus entered judgment in favor of defendants. Hicks appealed. The court of appeals reversed, ruling that once the district court found that the reasons proffered by defendants were not the true reasons for the demotion and discharge, it was compelled as a matter of law to enter judgment for Hicks.

Hicks began working at St. Mary's in August, 1978, as a correctional officer and was promoted to shift commander in February, 1980. Hicks remained shift commander until he was demoted, as set forth below. (Record ("R.") 1-13, 1-15.)

In 1983, George Lombardi, assistant director of the Division of Adult Institutions, received numerous complaints from inmates, former inmates, staff, legislators, and other citizens concerning conditions at St. Mary's. Lombardi placed an undercover investigator in St. Mary's to observe how the institution was being run. (R. 2-175-176, 2-181-182.) Lombardi also made a series of unannounced visits and found a poorly maintained institution with substandard upkeep, inadequate security measures, and no effective rules or regulations. (R. 1-10, 2-182-184, 1-186; Defendants' Exhibit ("Def. Ex.") DDD.) Lombardi

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[1] Hicks alleged a Title VII violation by St. Mary's and a § 1983 violation by Long. Hicks also alleged a violation of 42 U.S.C. § 1981 (1988) ("§ 1981") against St. Mary's and Long. Summary judgment in favor of the defendants was granted on that claim, and Hicks did not challenge that judgment on appeal.

instructed Arthur Schulte, St. Mary's Superintendent, to improve conditions, but Schulte failed. From April of 1983 through all of 1983, Schulte did not initiate any disciplinary action against any employee. (R. 1-10, 2-184-188; Def. Ex. EEE.) In January of 1984, Lombardi demoted and transferred Schulte to another correctional institution and replaced him with Steven Long. (R. 2-191.) Both Schulte and Long are white.

Other personnel changes were made. Gilbert Greenlee, the chief of custody, was demoted and transferred, and Carl McAboy and Charles Woodard, the other two shift commanders (in addition to Hicks), were discharged. (R. 1-23-24.) Lombardi initially offered the chief of custody position to a black, Richard Childs, who did not accept the position. (R. 2-189-191, 2-194-195.) John Powell, a white, ultimately was hired to replace Greenlee as chief of custody. After these and other personnel changes, Lombardi found remarkable improvements in the operation of St. Mary's. (R. 1-10, 2-192-194; Def. Ex. HHH.)

Hicks' performance after the reorganization, however, began to deteriorate. On March 3, 1984, Hicks was serving as shift commander when transportation officers Edward Ratliff and Frank Slinkard arrived to pick up inmates who were scheduled for outside jobs that day. When Ratliff and Slinkard arrived at the facility, the front door officer, Donald Treglown, was not at his post. (Later, he was found balancing his checkbook in the break room.) The control center officer, Elvis Thomas, momentarily left his assigned post to open the front door. After Ratliff and Slinkard entered St. Mary's, they noticed that the first floor lights were off. Hicks, who was performing a perimeter check of the premises, and another officer, Charles Kennedy, were not present when Ratliff and Slinkard entered St. Mary's. (R. 1-38-42, 1-200-209.)

Ratliff wrote an incident report to Powell, the chief of custody, concerning the violation of institutional rules he observed on March 3, 1984, including (1) the front door officer's absence

from his post, (2) the control center officer's leaving his post to open the front door, (3) the absence of Charles Kennedy, and (4) the lights off on the first floor. (R. 1-9, 1-211-212; Def. Ex. Q.) A four-person disciplinary review board, composed of two whites and two blacks, met and recommended that Hicks — who was shift commander at the time of those incidents — be given a five-day suspension.[2] In accordance with the recommendation, Hicks was suspended for five days. (R. 1-10, 1-38, 1-46, 1-97, 1-114-115, 1-127; Def. Ex. MM.) Treglown, a white, and Thomas, a black, were not disciplined for leaving their posts. Kennedy, a black, was not disciplined for being absent. (R. 1-46-47, 1-126.) Powell testified that it was his policy to discipline only the shift commander for violations which occurred during his shift. (R. 2-20-22.)

Another incident involving Hicks occurred two weeks later. On March 19, 1984, correctional officer Don Moore was ordered to work a double shift. Moore had driven a borrowed automobile to work that day, and had to return it to a friend at the end of the first shift. Moore asked Hicks if another correctional officer could follow Moore to his friend's house in a St. Mary's vehicle, and then drive Moore back to St. Mary's. Hicks ordered correctional officer Jimmy Davis to follow Moore in a St. Mary's vehicle. Institutional rules provide that each use of a St. Mary's vehicle be entered into a log. Neither Hicks, Moore, Davis, nor the control center officer entered into the log book the use of the St. Mary's vehicle. (R. 1-51-53.)

Powell recommended Hicks be disciplined for failing to log the use of the St. Mary's vehicle. (R. 2-30-31.) On April 6, 1984, a four-person disciplinary review board, again composed of two blacks and two whites, convened and voted to recommend the

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[2] The disciplinary review board makes a recommendation to the superintendent, who, in turn, makes a recommendation to the director of the Division of Adult Institutions, who makes the ultimate decision concerning discipline. (R. 1-115-116, 2-22-24, 2-108-109.)

demotion of Hicks. Powell, a member of this board, voted to discharge Hicks. Hicks was demoted for failing to ensure that the vehicle's use was logged. (R. 1-10, 1-54-55, 1-114-115; Def. Ex. OO.) Neither Moore, Davis, nor the control center officer were disciplined for failing to log the use of the vehicle. (R. 1-54, 2-62-64.) Moore and Davis are black.

Two days later, on March 21, 1984, two inmates were involved in a brawl in which one, Mark Valenti, was injured and received emergency medical treatment. After the brawl, Valenti told Hicks that he injured himself lifting weights. On the way to the hospital, Valenti admitted to correctional officer William Garrett that he was punched in the chest by inmate Allen Johnson. On March 21, Hicks drafted a memorandum to Powell informing him that there was a fight between Valenti and Johnson, injuring Valenti. Hicks ordered Garrett to submit a report. (R. 1-56-58.)

On March 24, 1984, Powell submitted a report to Steve Long in which he charged Hicks with failure to investigate the assault. Powell stated, "Although the medical outcount was logged, and a memorandum was submitted, NO ACION [sic] was taken by the Shift Commander in investigating the seriousness of the assault or the aftereffect to the residents involved." On March 29, 1984, Powell issued Hicks a letter of reprimand for failing to investigate the incident. (R. 1-10, 1-58-59, 2-38-39; Def. Ex. DD.)

On April 19, 1984, Hicks was notified of his demotion in a meeting with Long, Vincent Banks (the assistant superintendent), and Powell. Hicks was shaken by the news and requested the rest of the day off. Long granted Hicks' request. (R. 1-67-70.) Powell followed Hicks out of Long's office, so close, according to Hicks, that Powell was "stepping on the hells [sic] of my shoe." (Joint Appendix ("J.A.") 21.) Powell was "hollering in my ear," "following me and chasing me up and down," and "cutting me off, he wouldn't let me go out the door." (J.A. 21-22.) Powell protested to the control center officer that Hicks

could not take compensatory time off and demanded that Hicks open his locker to remove the sergeant's manual which had papers in it needed by Hicks' replacement. (J.A. 21-22, 35-36.) "He was shouting loud and belligerant [sic] for me to open my locker." (J.A. 23.) Hicks refused to go to the locker room to open his locker because "[w]ell, I knew if I went back there, it probably would have been a fight, because I was angry and Captain Powell was angry, too, and he kept provoking me." (J.A. 23.) Hicks was so shocked by Powell's conduct that Hicks asked Powell:

> So I asked him, I said, "Hey, you're a man and I am a man. Hey, you don't have to treat me like that, you know. Treat me like a man."
>
> Just like that.
>
> And he kept looking at me, laughing in my face.
>
> So I asked him, "What are you trying to do, provoke me and make me fight you?"
>
> And he said, "Yes."

(J.A. 24.) Hicks believed they were close to blows, but Horace Williams, who believed the situation was "getting out of hand" and was concerned that a physical altercation might occur, stepped between them and physically took Hicks out of the door. (J.A. 24, 29.) Powell heard Hicks say that he wanted Powell to "go out to the street with him," and Powell told Hicks that the statement could be misconstrued as a threat. (J.A. 38.)

Powell sought disciplinary action against Hicks for the threats made against him during the April 19, 1984, confrontation. On May 9, 1984, a four-person disciplinary board composed of at least two blacks convened and voted to suspend Hicks for three days. Long, however, disregarded their vote and recommended termination. Long testified that he based his decision on the

severity and accumulation of Hicks' violations. On June 7, 1984, Hicks was terminated. (R. 1-10, 1-75-76, 2-102-105; Def. Ex. QQ.)

As stated previously, numerous personnel changes occurred at St. Mary's in 1984. During the course of 1984, thirteen black employees were hired. In January, 1984, thirty blacks were employed at St. Mary's. By December, 1984, with all the organizational changes, twenty-nine blacks still were employed at St. Mary's. (R. 2-109-112.)

In 1980 and 1981, James Davis performed a study of the honor centers in St. Louis and Kansas City. The Davis study is a comprehensive comparison of the two institutions which discussed their shortfalls and suggested means of improvement. In a section toward the end of the study, Davis pointed out that too many blacks were in positions of power at St. Mary's and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real. (R. 1-4; Davis Deposition ("Dep.") 17, Dep. Ex. 1, at page 83.) Powell, Long, and Lombardi were not aware of the Davis study at the time of the 1984 personnel changes. (R. 2-48, 2-102, 2-195-196.) The author of the study characterized the potential for subversion as "brainstorming" and had "reservations" about whether it should have been included in the study or was "actually worth much." (R. 1-4; Davis Dep., 17-18, 54.)

After trial, the district court found that Hicks had established a prima facie case of racial discrimination because he (1) was a member of a protected class, (2) met the applicable job qualifications of a shift commander, (3) was demoted and discharged, and (4) his shift commander's position was filled by a white. (Pet. App. A-22 - A-23.) The district court further found that St. Mary's and Long introduced evidence of two legitimate, nondiscriminatory reasons for Hicks' demotion and discharge, which were the (1) severity and (2) accumulation of violations of institutional rules over a short period of time. (Pet. App. A-23.)

The district court also found that Hicks proved that the reasons adduced by St. Mary's and Long for Hicks' demotion and discharge were not the true reasons. First, the court indicated that Hicks was the only person disciplined for institutional rule violations actually committed by his subordinates. Second, though the chief of custody claimed it was his policy to discipline the shift commander for his subordinates' rule violations, a white shift commander was not so disciplined. Third, white employees were not disciplined for committing more serious rule violations than Hicks committed. Fourth, the chief of custody "manufactured" a confrontation between himself and Hicks that led to Hicks' discharge. (Pet. App. A-23 - A-26.)

The district court nonetheless concluded that Hicks failed to prove by a preponderance of the evidence his "ultimate burden" that his demotion and discharge were racially motivated. (Pet. App. A-26.) First, though Hicks proved that he was disciplined more harshly than his co-employees, his black subordinates, who actually committed the institutional rule violations for which Hicks was disciplined, were not disciplined at all. (Pet App. A-27.) Second, between January and December of 1984, St. Mary's hired thirteen blacks. Even after the reorganization, the number of blacks at St. Mary's remained virtually constant; thirty blacks were employed at St. Mary's in January of 1984 and twenty-nine in December of 1984. (Pet. App. A-27.) Third, the full-scale removal of employees from supervisory positions is often required when an institution is as poorly run as St. Mary's. (Pet App. A-28.) Fourth, before January of 1984, blacks held five of the six supervisory positions at St. Mary's. After January of 1984, two blacks and four whites held supervisory positions, and if the black to whom the chief of custody position initially had been offered had accepted the position, three whites and three blacks would have held supervisory positions. (Pet. App. A-27 - A-28.) Fifth, the disciplinary review board that reviewed Hicks' violation which led to his demotion was composed of two blacks and two whites and recommended demotion. (Pet. App.

A-28.) Sixth, Powell, Long, and Lombardi were never aware of the study which warned that black persons possessed too much power at St. Mary's. (Pet. App. A-28.)

The district court entered judgments in favor of St. Mary's on the Title VII action and in favor of Steven Long on the § 1983 action. (Pet. App. A-13, A-29, A-30.) The Court of Appeals for the Eighth Circuit concluded, however, that once the district court found that Hicks had proven pretext, "[t]he record of the district court thus contain[ed] the necessary findings to compel a conclusion that plaintiff is entitled to judgment as a matter of law." (Pet. App. A-12.) The court of appeals reversed the judgments of the district court. (Pet. App. A-12.)

SUMMARY OF ARGUMENT

In a disparate treatment, employment discrimination case under Title VII and § 1983, judgment for the employee is not compelled, as a matter of law, by a finding that the employer's legitimate, nondiscriminatory reason for the adverse employment action is pretextual. The employee retains at all times the burden of proving by a preponderance of the evidence intentional discrimination on the part of the employer. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). Absent a factual finding of intentional discrimination, judgment must be entered in favor of the employer. *U. S. Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983). Here, the district court weighed the evidence and made a factual finding of no intentional discrimination. That finding was not clearly erroneous and must be upheld.

The *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), three-step analytical framework does not, and does not purport to, eliminate or reduce the employee's burden to prove intentional discrimination. Rather, that case merely provides the employee with an initial presumption of discrimination once the employee has established a prima facie case of discrimination.

Burdine, 450 U.S. at 254, and n. 7. After the employer rebuts that presumption by merely offering evidence of, not proving, a legitimate, nondiscriminatory reason for the adverse employment action, that initial presumption drops from the case. *Burdine*, 450 U.S. at 255, and n. 10. The employee then must go forward and prove by a preponderance of the evidence intentional discrimination.

Here, the district court found that the employee had established a prima facie case of discrimination and that defendants had rebutted the prima facie case by offering evidence of legitimate, nondiscriminatory reasons for the adverse employment action. Thus, the presumption of discrimination dropped from the case, and plaintiff was required to prove intentional discrimination. The district court weighed all the evidence and concluded that no intentional discrimination occurred. Indeed, the district court found that the employee introduced through his own testimony evidence of personal animosity his immediate supervisor had toward him. The district court made the credibility determination that the supervisor's personal animosity was the truthful explanation for the employment decision. The district court found that there was other evidence that undermined any finding of intentional discrimination, including:

* the number of blacks employed over a period of time remained constant despite numerous organizational changes;

* a full-scale change in supervisory personnel was made necessary by how poorly the institution was run;

* the number of blacks and whites in supervisory positions would have been equal if the black to whom the chief of custody position was first offered had accepted the position;

* a committee composed of two blacks and two whites had recommended the employee's demotion; and

* no one recommending employment action was aware of a study which warned that blacks possessed too much power.

An "issue of fact remains in the case," *Burdine*, 450 U.S. at 254, when not "all legitimate reasons for [the employment decision] have been eliminated as possible reasons for the employer's action." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). Any reason supported by the evidence and not prohibited by Title VII is a lawful justification for an adverse employment action. Otherwise, Title VII becomes a statute prohibiting those reasons for employment decisions which may be proper or improper, but not discriminatory. Lawful justifications may include a host of motives, including personal animosity.

The court of appeals wrongly concluded that a judgment for the employee is compelled merely by a finding that the reasons adduced by the employer were not the true reasons for the adverse employment action. That conclusion ignores this Court's precedent that intentional discrimination is a factual question of actual motive, rather than a legal presumption to be drawn from a showing of something less than actual motive. *See Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982). The court of appeals also mistakenly relied on the prima facie presumption after that presumption had been rebutted and thus dropped from the case. That reasoning in effect removes the trier of fact from the decision-making process in Title VII cases and emasculates the requirement that the plaintiff prove intentional discrimination. The court of appeals' decision must be reversed, and the sound decision of the district court must be reinstated.

ARGUMENT

IN A TITLE VII AND § 1983 ACTION ALLEGING UNLAWFUL DISCRIMINATION, JUDGMENT FOR THE EMPLOYEE IS NOT COMPELLED, AS A MATTER OF LAW, BY A FINDING THAT THE EMPLOYER'S LEGITIMATE, NONDISCRIMINATORY REASONS FOR ADVERSE EMPLOYMENT ACTION ARE PRETEXTUAL.

A. INTENTIONAL DISCRIMINATION IS A FACTUAL QUESTION OF ACTUAL MOTIVE, RATHER THAN A LEGAL PRESUMPTION.

In a Title VII and § 1983 case alleging disparate treatment, the "'factual inquiry'" is whether the employer "'intentionally discriminated'" against the employee. *U. S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983), quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The ultimate burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated remains at all times with the employee. *Burdine*, 450 U.S. at 253. "[P]roof of discriminatory motive is critical" in disparate treatment cases. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

Intentional discrimination is a factual question of "actual motive" reviewable on appeal under the clearly erroneous standard, rather than just a "legal presumption to be drawn from a factual showing of something less than actual motive." *See Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982) (under §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1988), forbidding racial discrimination in a seniority system); *E.E.O.C. v. Flasher Co.*, No. 91-6279 (10th Cir. Dec. 29, 1992) (available on WESTLAW, 1992 WL 3843935, *3-4) (under 42 U.S.C. § 2000e-2(a)(1) (1988)); and *Holder v. City of Raleigh*, 867 F.2d 823, 827-829 (4th Cir. 1989) (same).

Where the employee attempts to prove intentional discrimination by indirect rather than direct evidence, the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), three-step analytical framework applies.[3] *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), citing *Teamsters*, 431 U.S. at 358 n. 44. At the first step, the employee has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. *Burdine*, 450 U.S. at 252-253. If established, a prima facie case creates a "rebuttable presumption," *Burdine*, 450 U.S. at 254 n. 7, of discrimination.

At the second step, if the employee established a prima facie case, the burden of production, not persuasion, shifts to the employer to introduce evidence of, not prove, a legitimate, nondiscriminatory reason for the employment decision. *Burdine*, 450 U.S. at 254-255. The employer need not convince the trier of fact that it was actually motivated by the proffered reason, but must only introduce evidence which is legally sufficient to justify a judgment for the employer. *Id.*

At the third step, if the employer carried its burden of production, the presumption raised by the prima facie case is rebutted, the presumption "drops from the case," *Burdine*, 450 U.S. at 255, and n. 10, and the trier of fact should proceed directly to decide the ultimate question of intentional discrimination. *Aikens*, 460 U.S. at 715-716.[4]

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[3] The framework also is applied to disparate treatment cases brought under §§ 1981 and 1983. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Richmond v. Board of Regents*, 957 F.2d 595 (8th Cir. 1992).

[4] One way in which an employee may attempt to raise a permissible inference of intentional discrimination is to show that the employer's proffered legitimate, nondiscriminatory reason for the employment decision was not the true reason or, in other words, was a mere "pretext." *See Burdine*, 450 U.S. at 256. Pretext is not, however, synonymous with pretext for discrimination or intentional discrimination. Citing *Mister v. Illinois Central Gulf Rr. Co.*, 832 F.2d 1427, 1435 (7th Cir. 1987), the district court defined pretext as follows:

(Footnote 4 continued on next page)

Because "the elusive factual question of intentional discrimination," *Burdine*, 450 U.S. at 254 n. 8, is "both sensitive and difficult," *Aikens*, 460 U.S. at 716, this Court has issued the following warning:

> The prima facie case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."

Aikens, 460 U.S. at 715, quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The sensitive and difficult question facing triers of fact in discrimination cases is best resolved by focusing on the ultimate question of discrimination, rather than the individual segments of the *McDonnell Douglas* allocation of burdens of proof. *Aikens*, 460 U.S. at 715-716. The three-step *McDonnell Douglas* framework for analyzing a Title VII case alleging disparate treatment "was never intended to

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(Footnote 4 continued)

> Pretext is a statement that does not describe the actual reason for the decision.

(Pet. App. A-23.) This definition is consistent with this Court's definition of pretext, "that the proffered reason is not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. A plain-spoken definition of pretext which also is consistent with this Court's definition is "a phony reason." *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 657 (7th Cir. 1991). Judge Posner's more elaborate definition makes clear that a showing of pretext raises only an inference of, not a presumption of, intentional discrimination:

> A pretext, in employment law, is a reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an *inference* that the employer is trying to conceal a discriminatory reason for his action. It is not . . . an unethical reason for action, or a mask for such a reason.

Visser, 924 F.2d at 657 (emphasis added).

provide a mechanistic approach to what ultimately becomes a straightforward trial about motive." *Flasher*, 1992 WL 3843935, at *2.

B. WHERE INDIRECT EVIDENCE OF INTENTIONAL DISCRIMINATION DOES NOT ELIMINATE ALL LAWFUL REASONS FOR THE EMPLOYMENT DECISION SUPPORTED BY THE EVIDENCE, JUDGMENT FOR THE EMPLOYEE IS NOT COMPELLED.

Where indirect evidence of intentional discrimination does not eliminate all lawful reasons for the employment decision supported by the evidence, judgment for the employee is not compelled. Legitimate, nondiscriminatory reasons for the employment decision, not proffered or articulated by the employer, may emerge during the employee's case or be suggested by the employer's evidence.

This Court has explained, in the context of the prima facie case, that a presumption of discrimination remains only "when *all* legitimate reasons for [the employment decision] have been eliminated as possible reasons for the employer's actions." *Furnco*, 438 U.S. at 577 (emphasis added). This Court also has explained, in the same context, that "[e]limination" of the employer's reasons for the employment decision is sufficient to create a presumption of discrimination "absent other explanation." *Teamsters*, 431 U.S. at 358 n. 44.

Therefore, it is not only the falsity of the proffered justification for the employment decision, but also the absence of any other justification supported by the record, that establishes intentional discrimination.

> It must be recognized, however, that it is not merely the falsity or incorrectness of the articulated reason that gives rise to the conclusion of pretext. Rather, it is [also] the resulting absence of a legitimate explanation for the suspect employment decision that warrants the finding of discrimination.

Sims v. Cleland, 813 F.2d 790, 793 (6th Cir. 1987). When not "all legitimate reasons for [the employment decision] have been eliminated as possible reasons for the employer's action," *Furnco*, 438 U.S. at 577, an "issue of fact remains in the case." *Burdine*, 450 U.S. at 254.

Where indirect evidence does not eliminate all lawful reasons for the employment decision supported by the evidence, the trier of fact is not compelled to find intentional discrimination and return a judgment for the employee. Rather, the trier of fact must weigh all the evidence — as the district court did here — and make a factual and credibility determination as to whether intentional discrimination has occurred. The trier of fact may return a judgment for the employee based upon an inference of discrimination drawn from the indirect evidence that the employer's proffered justification for the employment decision was not its true justification. The trier of fact, however, may return a judgment for the employer based upon its determination that the true reason for the employment decision was a lawful, nondiscriminatory reason contained in the record — here, personal animosity. What judgment the trier of fact returns will be determined by which explanation for the employment decision, discrimination or the remaining lawful reason, the trier of fact believes to be the truthful explanation for the employment decision. Those types of factual determinations must be made by the fact finder — not an appellate court.

C. ANY REASON SUPPORTED BY THE EVIDENCE AND NOT PROHIBITED BY TITLE VII IS A LAWFUL REASON FOR THE EMPLOYMENT DECISION.

Any reason supported by the evidence and not prohibited by Title VII is a lawful justification for an adverse employment

action. Otherwise, Title VII becomes a statute prohibiting those reasons for employment decisions which may be proper or improper, but not discriminatory. Possible reasons are a violation of a civil service system or collective bargaining agreement, personal or political favoritism, nepotism, a grudge, personal animosity, random conduct, an accident, a mistake, an error in the administration of neutral rules, a desire to deter violence in the workplace, financial pressure to reduce expenses, the efforts of new management to assert its authority, and even discrimination not prohibited by Title VII, such as age discrimination.

> Even assuming the original prima facie case plus the evidence of pretext suffices to raise a reasonable inference of discrimination, this does not automatically entitle plaintiff to judgment. Provided a contrary inference (of nondiscrimination) might also reasonably be drawn from the evidence, such showing only creates an issue of material fact for trial and, if discrimination is subsequently found, will support that finding.

Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991).

In *Holder v. City of Raleigh*, 867 F.2d 823 (4th Cir. 1989), a judgment for the city on Holder's Title VII claim was affirmed. Holder claimed he was not appointed to one of two openings in the ground maintenance crew because of his race. The district court found that Holder proved a prima facie case and that the city's legitimate, nondiscriminatory reasons of a low interview score and administrative inconvenience were pretextual. The district court further found that pretext did not prove racial discrimination, but rather proved nepotism in filling the ground maintenance crew positions with the son of the crew supervisor and the nephew of one of the interviewers. *Holder*, 867 F.2d at 824-826. The appellate court recognized the facts that all of the interviewers were white, six of the seven crew supervisors were white, and the effect nepotism would have on minorities would

be relevant to and provide a basis for inferring racial discrimination. Such an inference was not compelled, though, because an "intention to discriminate remains a question to be resolved by the ultimate trier of fact." *Holder*, 867 F.2d at 827. The appellate court reasoned that finding the city's legitimate nondiscriminatory reasons to be pretextual or unworthy of credence did not compel judgment for the employee because "[t]he reason for the lack of credence must be the underlying presence of proscribed discrimination." *Holder*, 867 F.2d at 827-828.

In *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1497, 117 L.Ed.2d 637 (1992), the employer discharged Galbraith and Hunter, a white woman and a black man who were dating. Hunter was ostensibly discharged because he abused personal leave by not immediately traveling to New Orleans for his mother's personal crisis. Galbraith was ostensibly discharged for abusing medical leave after she was shot by Hunter in the parking lot of their work place when Hunter was supposed to have been in New Orleans. The court thought it "apparent" that the legitimate, nondiscriminatory reasons proffered by Northern Telecom were pretextual, but that pretext did not establish racial discrimination.

The court thought that the "far more compelling" explanation for Galbraith and Hunter's discharge was Northern Telecom's concern that Galbraith and Hunter's association demonstrated a propensity for violence which threatened the safety and lives of its personnel. *Galbraith*, 944 F.2d at 282-283. The court stated: "A reason is legitimate for purposes of civil rights law if it is nondiscriminatory, even if it is mean-spirited, ill-considered, inconsistent with humane personnel policies, or otherwise objectionable." *Galbraith*, 944 F.2d at 282. The court also stated: "Under Title VII, association with a violent person would be a legitimate reason for discharging Galbraith, because it is not motivated by racial considerations." *Id.*

The court did not believe that the findings of pretext but no intentional discrimination violated the *McDonnell Douglas* framework because the employer had only a burden of production, and the employees' burden of persuasion that the proffered reasons were pretextual was the same as their ultimate burden of intentional discrimination. *Galbraith*, 944 F.2d at 283.

Judge Posner, writing for the Court of Appeals for the Seventh Circuit, has stated:

> If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind the rule of *McDonnell Douglas*. It is important to understand, however, that the inference is not compelled. The trier of fact must decide after a trial whether to draw the inference. The lie may be concealing a reason that is shameful or stupid but not proscribed, in which event there is no liability.... The point is only that if the inference of improper motive can be drawn, there must be a trial.

Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990) (citation omitted).

The Seventh Circuit has also stated:

> Benzies argues that if the plaintiff does so — in the argot, shows that the explanation is a "pretext" — then the district court must infer that the employer acted with discriminatory intent. Not so. The demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law. The judge may conclude after hearing all the evidence that neither discriminatory intent nor the employer's explanation accounts for the decision.

Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987).

The Seventh Circuit has recognized that the reason a finding of intentional discrimination is not compelled by a finding of pretext is that discrediting a legitimate, nondiscriminatory reason for adverse employment action does not necessarily eliminate all lawful motives for the employment decision.

> A public employer may feel bound to offer explanations that are acceptable under a civil service system, such as that one employee is more skilled than another, or that "we were just following the rules." The trier of fact may find, however, that some less seemly reason — personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules — actually accounts for the decision. Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute. . . . Unless the employer acted for a reason prohibited by the statute, the plaintiff loses. The failure of an explanation to persuade the judge supports an inference that a bad reason accounts for the decision, but it is not invariably conclusive; the presence of a sufficient explanation, however, is dispositive against the plaintiff. (A "sufficient" explanation is one that would produce the same decision whether or not the prohibited characteristic played some role.)

Benzies, 810 F.2d at 148 (citation omitted).

> Showing that the employer dissembled is not necessarily the same as showing "pretext *for discrimination*" .... It is easy to confuse "pretext for discrimination" with "pretext" in the more common sense (meaning any fabricated explanation for an action) ....

Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 559 (7th Cir.), cert. denied, 484 U.S. 977 (1987). See also *Veatch v. Northwestern Memorial Hospital*, 730 F. Supp. 809, 819 (N.D. Ill. 1990), where the record suggested financial pressure to

reduce expenses, efforts by new management to assert its authority, and discrimination not prohibited by Title VII (age discrimination) as explanations for the employment decision.

In *E.E.O.C. v. Flasher Co., Inc.*, No. 91-6279 (10th Cir. Dec. 29, 1992) (available on WESTLAW, 1992 WL 3843935), the employer disciplined less severely non-minority employees who had committed infractions that were of equal seriousness as the infraction that the discharged minority employee committed. Judgment for the employer was affirmed because differential treatment between a minority employee and a nonminority employee that is irrational or accidental does not necessarily compel a finding of intentional discrimination. The court stated:

> Indeed, even a finding that the reason given for the discipline was pretextual does not compel such a conclusion . . . . Merely finding that people have been treated differently stops short of the crucial question: why people have been treated differently. While comparing specific disciplinary actions can give rise to an inference of discrimination, it need not do so. Proffered reasons may be a pretext for a host of motives, both proper and improper, that do not give rise to liability under Title VII.

Flasher, 1992 WL 3843935, at *7 (citation omitted).

D. IN THIS CASE, THOUGH THE DISTRICT COURT FOUND PRETEXT, IT BELIEVED THE EMPLOYEE'S OWN EVIDENCE OF HIS IMMEDIATE SUPERVISOR'S PERSONAL ANIMOSITY TO BE THE TRUTHFUL EXPLANATION FOR THE EMPLOYMENT DECISION.

The district court found that the evidence introduced by Hicks demonstrated a lawful reason for Hicks' demotion and discharge. Hicks testified on direct examination that after he was informed of his demotion, Powell, the chief of custody, admitted

he was trying to provoke Hicks to fight by following Hicks so closely as to step on the heels of his shoes, hollering in his ear, chasing him, blocking his exit, shouting loudly and belligerantly, and laughing in his face. (J.A. 21-24.) An eyewitness to the confrontation between Powell and Hicks stepped between them and took Hicks out the door to prevent a fight. (J.A. 29.) This testimony led the district court to believe Powell manufactured the confrontation between himself and Hicks in order to discharge Hicks.

> The violation for which plaintiff was terminated involved plaintiff making threats to Powell. Although the court does not condone the threatening of one's supervisor, the evidence suggests that Powell manufactured the confrontation between plaintiff and himself in order to terminate plaintiff. After plaintiff was informed of his demotion, he was distressed and requested the day off. Steven Long granted the request. As plaintiff attempted to leave, Powell followed him and provoked him into behaving irrationally.

(Pet. App. A-26, footnote omitted.) This evidence that Powell manufactured the confrontation in order to discharge Hicks provided the lawful reason for Hicks' discharge, the personal animosity between Powell and Hicks. The district court stated:

> It is clear that John Powell had placed plaintiff on the express track to termination. It is also clear that Powell received the aid of Ed Ratliff and Steve Long in this endeavor. The question remains, however, whether plaintiff's race played a role in their campaign.
>
> * * *
>
> In essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated.

(Pet. App. A-26, A-27.)[5]

In addition to this proof of a lawful reason for Hicks' demotion and discharge, Powell's personal animosity toward Hicks, the district court cited other evidence that undermined any inference of intentional discrimination. Though Hicks proved that he was disciplined more harshly than his co-employees, his black subordinates, who actually committed the institutional rule violations for which Hicks was disciplined, were not disciplined at all. (Pet. App. A-27.) Between January and December of 1984, thirteen blacks were hired at St. Mary's. Thirty blacks were employed at St. Mary's in January of 1984 and twenty-nine still were employed in December of 1984. (Pet. App. A-27.) A full-scale removal of employees from supervisory positions is often required when an institution is as poorly run as St. Mary's. (Pet. App. A-28.) Before January of 1984, blacks held five of the six supervisory positions at St. Mary's. After January of 1984, two blacks and four whites held supervisory positions, and if the black to whom the chief of custody position was initially offered had accepted the position, three whites and three blacks would have held supervisory positions. (Pet. App. A-27 - A-28.) The disciplinary review board which reviewed Hicks' violation which led to his demotion, composed of two blacks and two whites, recommended demotion. (Pet. App. A-28.) Powell, Long, and Lombardi were never aware of the study which warned that black persons possessed too much power at St. Mary's. (Pet. App. A-28.) The district court weighed all the evidence, in addition to the employee's evidence of his supervisor's personal animosity, and made the factual determination that intentional discrimination did not occur. That factual determination is not clearly erroneous.

[5] The court of appeals was thus incorrect when it characterized the district court's finding that the employment decision was motivated by personal animosity as an "assumption." (Pet. App. A-10.) As pointed out by the district court, Hicks' own testimony provided evidence of that personal animosity.

E. THE COURT OF APPEALS' REASONING THAT A FINDING OF PRETEXT COMPELS JUDGMENT FOR THE EMPLOYEE MISTAKENLY APPLIES THE PRESUMPTION OF DISCRIMINATION OF THE PRIMA FACIE CASE AFTER IT HAS BEEN REBUTTED AND DROPPED FROM THE CASE.

The Court of Appeals for the Eighth Circuit reversed the district court's judgments and stated its reasoning that judgment for Hicks was compelled as follows:

> Once plaintiff proved all of the defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law. Because all of defendants' proffered reasons were discredited, defendants were in the position of having no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.

(Pet. App. A-10.)

The Eighth Circuit's reasoning ignores the precedent of this Court and other circuits that intentional discrimination is a factual question of actual motive, rather than a legal presumption to be drawn from a factual showing of something less than actual motive. This reasoning is merely a mistaken application of the "rebuttable presumption," *Burdine*, 450 U.S. at 254 n. 7, of the prima facie case after it has been rebutted and dropped from the case, *Burdine*, 450 U.S. at 255, and n. 10, by evidence of the employer's justification for the employment decision. This reasoning has been specifically rejected by another circuit.

It was suggested at oral argument in this case that a mechanical application of the *McDonnell Douglas* frame-

> work was the correct one. Under that analysis, once a plaintiff has produced evidence of pretext, the employer's justification vanishes, and the original *McDonnell Douglas* inference of discrimination rises again .... We reject that formalistic approach as not in keeping with either the Supreme Court doctrine or common sense.

Villanueva v. Wellesley College, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 181, 116 L.Ed.2d 143 (1991). The Eighth Circuit's reasoning removes from the trier of fact the decision making power in Title VII cases and mandates judgment for the employee even if, as here, the trier of fact believes that a nondiscriminatory reason was the truthful reason for the employment decision. The Eighth Circuit's reasoning must be rejected.

In summary, the district court properly realized that intentional discrimination is the key factual issue in an employment discrimination case. The district court believed that the supervisor's personal animosity was the truthful explanation for the employment decision, rather than either intentional discrimination or the employer's proffered justifications. Therefore, the district court properly found that the employee had not proven intentional discrimination and entered judgments accordingly. The district court's conclusion is consistent with Title VII, the decisions of this Court, and common sense, is not clearly erroneous, and must be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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February, 1993

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No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER AND STEVEN LONG,
Petitioners,

v.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT MELVIN HICKS

STATEMENT OF THE CASE

Respondent Melvin Hicks, an African-American, began working as a correctional officer at St. Mary's Honor Center, a facility of the Missouri Division of Corrections, in 1978. In 1980, he was promoted to shift commander. In 1984, Hicks was demoted and then discharged from this position. He filed suit against Petitioners St. Mary's Honor Center and Steven Long, Superintendent of St. Mary's, alleging that Petitioners had demoted and discharged him on the basis of his race and in retaliation for his filing a complaint with the Equal Employment Opportunity

Commission, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint also alleged that Petitioner Long had violated Hicks' rights under 42 U.S.C. §1983. Order and Memorandum of the District Court, Appendix to Petition for Writ of Certiorari ("Pet."), at pages A-14 to A-15, A-18.

In 1981, the Deputy Director of the Missouri Division of Corrections, in Jefferson City, Missouri, requested a statewide study of the correctional facilities that, *inter alia*, addressed the "organizational stability" of St. Mary's. Joint Appendix ("J.A.") at 68-70; 81-85. The study measured "shares of power" held by black and white supervisors [levels 2-6] and correctional officers (CO-1s) at St. Mary's, noting that at level 2, the custody sergeants, there were no whites:

6. W
5. B
4. W W B W W
3. B B B B B B B
2. B B B
1. B B B B B B B B B W B B B B B W B B B B B

J.A. 82-83. The study concluded that although the "executive positions are racially balanced (one White and one Black), because "the majority of the program staff (63.64%) is black ... the potential for subversion of the Superintendent's power — should the staff become racially polarized — is very real." J.A. 85. The Director and Deputy Director of the Division of Corrections discussed the report with management and circulated copies to Superintendents of the Centers. J.A. 70, 71, 73.

In late 1983, there were numerous complaints to the Division about the conditions and operations at St. Mary's. Pet. A-15. Among the complainants were two white correctional officers from St. Mary's who called and visited Jefferson City because "they wanted to make promotion, but

they said blacks were in the way, so they couldn't be promoted." Record ("R.") at page 1-21. After investigations, in January 1984 the Superintendent at St. Mary's was transferred and replaced by Petitioner Steven Long. Pet. A-15. John Powell, a white male, became the Chief of Custody, over the three Shift Commanders. Pet. A-15.

Supervisory personnel in the custody section of St. Mary's changed dramatically after Petitioner Long's appointment. During the four months between Long's arrival and Hicks' departure, the custody supervisors underwent the following transformation:

	Jan. 1984	April 1984
6. Superintendent	W - Schulte	W — Long
5. Asst. Superintendent	**B** - Banks	B - Banks
3. Chief of Custody	**B** - Greenlee	W — Powell
2. Shift Supervisor	**B** - Woodward	W — Hefele
" "	**B** - MacAvoy	W — Wilson
" "	**B** - Hicks	W

Pet. A-15, A-27; J.A. 56-57, 82.

The trial court found that when Long arrived in January 1984 there were 30 blacks employed, and when he left the facility in May, 1985 there were 29 blacks employed. R. 2-111. In the first year after Long and Powell took charge, twelve blacks were fired and one demoted, but only one white was terminated. R. 3-10 to 3-11.

The testimony revealed that while Long could effectively terminate employees, he did not control the hiring for level 1 CO-1s, the bulk of the positions. That was done pursuant to merit system lists by the central personnel office in Jefferson City:

QUESTION: You're the one that recommends the CO-1s?

> THE WITNESS: Not CO-1s. They come directly from Jefferson City. They have a central pool.

J.A. 67 (testimony of Vincent Banks).

The district court found that Hicks established a prima facie case, under *McDonnell Douglas*, 411 U.S. 792 (1973), by showing that he is a member of a protected class; that he met the job qualifications of a shift commander, as proven by his experience, satisfactory record, and ratings; that he suffered adverse actions in his demotion and termination; and that after his demotion, the position remained open and was then filled by a white male. Pet. A-22 to A-23.

The court found that the burden then shifted to the Petitioners to set forth a legitimate, non-discriminatory reason for the adverse employment decisions. Pet. A-23. Petitioners set forth two reasons for the adverse action: "the severity and the accumulation of violations committed by plaintiff." Pet. A-23. Long testified that the reasons for termination were:

> Mainly, an accumulation of the infractions by Mr. Hicks, of the problems that had been accounted (sic) to that point, without any appearance of any improvement in his conduct, and the seriousness of that individual incident.

R. 2-104.

In the six years before the arrival of Long and Powell, Hicks had not been suspended or disciplined, Pet. A-16, but was disciplined three times in March 1984: (i) for being the shift commander on duty when a front door officer was away from his post, for which he received a five day-suspension, Pet. A-15, A-16; (ii) for failing to correct the log of a subordinate's use of St. Mary's vehicle, for which he was

demoted to CO-1, Pet. A-17; and (iii) for allegedly failing to investigate a fight between inmates, for which he received a reprimand letter, Pet. A-18. Around April 11, 1984 Hicks filed an EEOC complaint complaining of racial discrimination in employment conditions. Amended Complaint, ¶ 10.

The district court compared the plaintiff's disciplinary violations with actions taken against others for similar or more serous violations. The court noted that the plaintiff was the only supervisor disciplined for violations committed by his subordinates, Pet. A-24, that far more serious infractions by other supervisors and CO-1s (many of whom where white) were punished far less severely, Pet. A-25. These included allowing guests with guns into the institution, allowing inmates to escape and allowing inmates access to personal files and the Center's power room, and were punished less severely, if at all. Pet. A-25 to A-26.

On April 19, 1984 Steven Long and John Powell met, in Assistant Superintendent Vincent Banks' office, with Hicks to inform him of his demotion to CO-1 status and reduction in his salary. Pet. A-18. Powell and Long assigned Hicks be a front door officer and informed him he would have to perform custodial duties. J.A. 43. Powell testified that custodial duties had never been assigned to a front door officer before. J.A. 43. After the meeting, Powell followed Hicks and heated words were exchanged. Hicks left without further incident. Pet. A-18.

At trial, Powell denied any personal difficulty with Melvin Hicks: "I can't say that there was difficulties between he and I. At no time was there any kind of personal --" J.A. 46. Although Powell also denied any instigating role in the confrontation with Hicks, J.A. 46, the district court stated that the evidence suggested that Powell had "manufactured the confrontation between plaintiff and himself in order to terminate plaintiff." Pet. A-26. Powell

wanted to take disciplinary action against Hicks for the incident. Pet. A-18. Hicks filed a second EEOC complaint on May 7, 1984, alleging demotion of the basis of race and amended it to add the discharge claim. Am. Comp. ¶ 15.

On May 9, 1984 a four person disciplinary review board, composed of two blacks, recommended a three day suspension of Hicks for the confrontation. Pet. A-18 to A-19. Petitioner Long testified that he looked at Sgt. Hicks' entire record and no questions were raised in his mind about the propriety of Mr. Hick's dismissal under those circumstances, [R. 2-155], although the disciplinary board, had recommended a far lesser sanction, R. 2-156. He "disregarded their vote and recommended termination." Pet. A-18 to A-19. Donald Wyrick, Director of the Division of Adult Institutions, approved the final discharge decision. R. 2-109.

The trial court concluded, based on its extensive comparison of the application and degree disciplinary practices at St. Mary's, that the reasons proffered by Petitioners were pretextual. Pet. A-23. However, after finding pretext by Petitioners, the court held that plaintiff nonetheless had to prove that race was the reason for the action against him. Pet. A-26. The court stated:

> It is clear that John Powell had placed plaintiff on the express track to termination, but that it is also clear that Powell received the aid of Ed Ratliff [white] and Steve Long in this endeavor. The question remains, however, whether plaintiff's race played a role in their campaign.

Pet. A-26. The court further noted that "although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." Pet. A-27.

In reaching its final conclusion that Hicks had failed to prove by "direct evidence or inference that his unfair treatment was motivated by his race," Pet. A-29, the district court discounted the disproportionate firing of blacks at St. Mary's because it thought that Defendant Long had hired blacks also; the court noted that CO-1 blacks were not disciplined for violations occurring on plaintiff's shift, that blacks sat on the disciplinary review boards, that a large number of black supervisors were fired because nearly all the supervisors were black at the beginning of 1984, and that both Long and Powell testified that they did not know of the study regarding racial balance. Pet. A-27 to A-28.

The court entered judgment for St. Mary's Honor Center on Respondent's claim of race discrimination in violation of Title VII, Pet. A-29, and also entered judgment for Steve Long on the claim of racial discrimination under 42 U.S.C. §1983 for the same reasons, Pet. A-30. No mention was made in the findings about the judgment of plaintiff's claim of retaliation under Title VII.

On appeal, the Court of Appeals for the Eighth Circuit reversed, finding that once plaintiff proved a prima facie case and that the employer's articulated reasons were pretextual, plaintiff was entitled to judgment as a matter of law. Pet. A-12. The Court of Appeals did not address the question whether the district court's "assumption" of the unarticulated personal reason of animosity was proper, because it found that the that reason was never claimed by defendants. Pet. A-10. The appellate court did not review the findings of the trial court for clear error and did not rule on the issue of retaliation because it reversed the district court on the basis of plaintiff's disparate treatment theory. Pet. A-12, n.9:

> In this circuit, if the plaintiff has met his or her burden of proof at the pretext stage — that is, if the plaintiff has proven by a

> preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action — then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required.

Pet. A-11. The court of appeals reversed the judgement of the district court on the merits of plaintiff's Title VII claim against St. Mary's, and the §1983 claim against Long. Pet. A-12.

The defendants, St. Mary's Honor Center and Steven Long, filed a petition for certiorari with the Supreme Court of the United States, this petition was granted and the case set for argument.

SUMMARY OF ARGUMENT

I.

The *McDonnell Douglas/Burdine* line of cases requires that judgment be entered for a Title VII plaintiff if the reasons articulated by the defendant as the "legitimate, nondiscriminatory" reasons for the disputed employment decision are proven to be false. This follows because upon the establishment of a prima facie case, prohibited discrimination is established as one of the possible reasons for the decision. All other possible reasons except the ones articulated and relied upon by the employer necessarily drop out of the case. Therefore, if the articulated reasons are demonstrated to be false and therefore pretextual, the only reason remaining in the case is prohibited discrimination.

II.

It is inconsistent with the purpose of the *McDonnell*

Douglas/Burdine line of cases to permit a defendant to rely on a reason not articulated as being the one for making the employment decision. A central purpose of the *McDonnell Douglas/Burdine* order of proof is to eliminate all reasons not relied on and to permit full exploration of the reasons articulated by the employer. A plaintiff is unable to do so if the trial court relies on a reason not advanced by the employer. Thus, the truth-seeking function of the inquiry is undermined.

III.

It is clear that a plaintiff may prove pretext *either* through direct evidence of discrimination *or* by demonstrating that the articulated reasons are in fact not the real reasons. The adoption of the "pretext-plus" rule advanced by Petitioners would, in effect, require that plaintiffs adduce direct evidence of racist motivation in order to prevail. Such a result is directly contrary to the unanimous decisions of this Court in the *McDonnell Douglas/Burdine* line of decisions.

IV.

The district court erred as a matter of law in holding that additional evidence proved that racial discrimination was not a motivating factor in the discharge of Respondent. These errors required the reversal of the decision of the district court.

ARGUMENT

Our nation's commitment to enforcing fully Title VII, 42 U.S.C. § 2000e *et seq.*, and other anti-discrimination laws has required the courts and Congress to address the difficulties of proving subtle, as well as blatant, cases of

discrimination.[1] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Justice Powell, wrote for a unanimous Court, setting forth rules that would govern the order of proof and the allocation of the evidentiary burdens in cases alleging intentional discrimination. This Court further explained the *McDonnell Douglas* inquiry, again in a unanimous opinion, in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Under the *McDonnell Douglas* inquiry, the plaintiff carries the initial burden of proving, by a preponderance of the evidence, a prima facie case of the forbidden discrimination. The prima facie requirements vary depending on the factual situation and the adverse action at issue, for example, in a failure to hire case a plaintiff would

[1]Some cases of intentional discrimination can be proved by direct evidence of discrimination, *e.g., Teamsters v. United States*, 431 U.S. 324 (1977), but, in most cases only indirect evidence will be available. Because Title VII prohibits all forbidden discrimination, not only in cases where there is a "smoking gun," standards that guide the courts' evaluation of indirect proof of discrimination are crucial. For example,

> Age discrimination may be subtle and even unconscious. Even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one. When evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up. The indirect method [of proof] compensates for these evidentiary difficulties by permitting the plaintiff to prove his case by eliminating all lawful motivations, instead of proving directly an unlawful motivation.

Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988), *quoting La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984).

show

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants, (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S., at 802.[2] Proof of a prima facie case establishes a legally mandatory, rebuttable presumption, which, if the defendant remains silent, requires judgment for the plaintiff. *Burdine*, 450 U.S., at 254 n.7.

Next, if the plaintiff succeeds in proving the prima facie case, the burden must shift to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S., at 802. This is a burden of production, under which "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S., at 254-55. Although the reasons need not be proved by a preponderance of evidence at this stage, they must be legally sufficient to justify a judgment for the defendant. *Id.* 450 U.S., at 255. Meeting this burden

> serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate

[2]The facts required to make out a prima facie case will necessarily vary in Title VII cases. *Burdine*, 450 U.S., at 253 n.6. Thus, in this discharge case, the district court found that Respondent had proven that (i) he was a member of a protected class, (ii) met the qualifications for his job, (iii) was nonetheless demoted and discharged, and (iv) the position remained open after his demotion and was then filled by a white male. Pet. App. A-22 to -23.

> reason for the action *and* to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Id., at 255-56 (emphasis added). The defendant's evidence must serve these two functions in order to be sufficient to discharge its burden and to rebut the presumption of discrimination. *Id.*, at 256.

Finally, if the defendant meets its burden of production, the burden shifts back to the plaintiff. In *Burdine*, this Court explained the plaintiff's ultimate burden of persuasion in a single paragraph that concluded its discussion of the three-part test:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now *merges* with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this *either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U.S., at 804-05.

Burdine, 450 U.S. at 256 (emphasis added). The interpretation of this paragraph lies at the heart of the controversy of this case.

I. A TITLE VII PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IF HE PROVES THAT EVERY NON-DISCRIMINATORY REASON PROFFERED BY THE DEFENDANT WAS NOT CREDIBLE.

After a plaintiff has proven a prima facie case and a defendant proffers its reason for the allegedly discriminatory action, a plaintiff under *McDonnell Douglas* "may succeed ... by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S., at 256. The court of appeals held, correctly in Respondent's view, that a plaintiff is entitled to judgment if he or she convinces the court -- as concededly occurred here -- that all of the employer's proffered explanations were unworthy of credence. Pet. App. A-26. Petitioners contend, on the other hand, that a plaintiff must do far more. A Title VII plaintiff is not entitled to judgment, Petitioners urge, unless the plaintiff "eliminate[s] *all* lawful reasons for the employment decision." Brief for the Petitioners ("Pet. Br.") at 16 (emphasis added).

A. By Process of Elimination, *McDonnell Douglas* Narrows the Factual Issues to Determine Whether There was Discrimination.

Petitioners' argument that a plaintiff must eliminate *all* conceivable legitimate explanations is inconsistent with the fundamental methodology of *McDonnell Douglas* and its progeny. *McDonnell Douglas* does not contemplate that the evidence or findings of fact and conclusions of law in a Title VII case must canvas all, or even most, conceivable explanations for a disputed employment practice. Rather, the serial ordering and allocation of burdens in *McDonnell Douglas* "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S., at 354 n.8.

The three-part *McDonnell Douglas* inquiry is structured as a process of elimination. As then-Justice Rehnquist explained in *Furnco Construction Corp. v. Waters*, 438 US. 567 (1978), the primary principle guiding the inquiry is to evaluate evidence "in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S., at 577. The *Furnco* Court explained the fundamental methodology of the *McDonnell* model of indirect proof:

> more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco, 438 U.S., at 577. Against this understanding, each step of the inquiry is designed to present the litigants and fact finder with questions that progressively narrow all possible reasons for the employer's action until the "real" reason is revealed. These presumptions, burdens, and inferences "reflect judicial evaluations of probabilities and ... conform with a party's superior access to the proof." *Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977) (citations omitted). If, at the end of the three-step inquiry, no nondiscriminatory reason remains, the necessary inference is that invidious discrimination was in reality the motive for the disputed action.

The first step of *McDonnell Douglas* requires the plaintiff, in order to proceed further, to prove a prima facie case. This "serves a important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, 450 U.S., at 253-54.

Those reasons are (i) that there was no job vacancy, and (ii) that the plaintiff was absolutely or relatively unqualified. *Teamsters*, 431 U.S., at 358 n.44. Those facts, coupled with the additional prima facie evidence that the plaintiff was a member of a protected class and was bypassed or replaced by a person not from that class, creates a presumption of discrimination. Discrimination is presumed because "we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S., at 577.

Once a plaintiff has established a prima facie case, the focus of the judicial inquiry, and the proof required of each party, narrows. The inquiry now focuses on the particular explanations that the employer itself chose to proffer through admissible evidence. Placing the burden on the employer reflects the ability and motivation of the employer to identify any legitimate, nondiscriminatory explanations for which there may be substantial evidentiary support:

> [T]he employer [i]s in the best position to show why any individual employee was denied an employment opportunity.... [In some instances] the company's records [are] the most relevant items of proof. If the [disputed action] was based on other factors, the employer and its agents kn[o]w best what those factors were and the extent to which they influenced the decisionmaking process.

Teamsters, 431 U.S., at 359 n.45. The litigation decision of the employer to place in controversy only those particular explanations eliminates from further consideration the alternative explanations that the employer chose not to advance. These discarded reasons must now be presumed not to be possible reasons in fact for the challenged action.

McDonnell Douglas is deliberately framed to assure that the list of possible explanations to be addressed at trial is winnowed down; the defendant cannot put a possible explanation into issue merely by mentioning it in a pleading or a brief, but must specifically frame the proffered reason and support it with admissible evidence. *Burdine*, 450 U.S., at 255. These requirements would be meaningless if plaintiffs and courts were obligated to consider "all" possible reasons or any of a myriad of explanations that a defendant itself chooses not to proffer. The potentially infinite inquiry suggested by Petitioners would be impossible for any plaintiff to complete, and unwieldy for any court to assess. The discovery necessary merely to attempt to disprove "all" possible reasons would be boundless.

"The factual inquiry proceeds to a new level of specificity" once the employer discharges its burden of articulating a particular reason or reasons for its actions. *Burdine*, 450 U.S., at 255. The litigation then focuses exclusively on the specific reasons proffered by the employer.

At this point, the issue before the court is narrow, albeit at times difficult: "In short, the district court must decide which *party's* explanation of the employer's motivation it believes." *United Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (emphasis added).

At the final step of the *McDonnell Douglas* inquiry the plaintiff must address the employer's articulated reasons for the challenged action. *Burdine* quite clearly explains how this task "merges with" the plaintiff's ultimate burden of persuasion to allow two courses of action, which it states in the disjunctive. *Burdine*, 450 U.S., at 255. The plaintiff may *either* prove that discrimination was more likely than the articulated reasons to have been the employer's real motivation, *or* prove simply that those stated reasons were not in fact the employer's motivations. The latter option,

proof that the stated reasons are not credible, proves by inference that discrimination was the reason, since all possible nondiscriminatory reasons have been eliminated from the case either because they were not articulated by defendant or because they were proved to be false. No reasons remain but the discrimination that we infer from our common experience. *See Furnco*, 438 U.S., at 577. That factual finding discharges the ultimate burden of persuasion and compels a judgment for the plaintiff.[3] Additional proof of discrimination, direct or indirect, would be redundant.

In this case, Petitioners concede, the district court proceeded to reject as not truthful the explanations they proffered at trial. Pet. Br. 11, 17, 26; Pet. App. A-26. Having eliminated the only lawful reasons properly before the court under *McDonnell Douglas*, Respondent was under no obligation to go further and address "all," or any, other conceivable explanations that Petitioners had chosen not to assert. Having eliminated the only non-discriminatory explanation in issue, respondent was entitled to a judgment that the only remaining motive at issue -- racial discrimination -- had been established.

The following diagram illustrates the narrowing of issues in a case, like this one, in which a plaintiff proves a prima facie case which is met by articulated reasons by the employer, which are then proved to be unworthy of credence.

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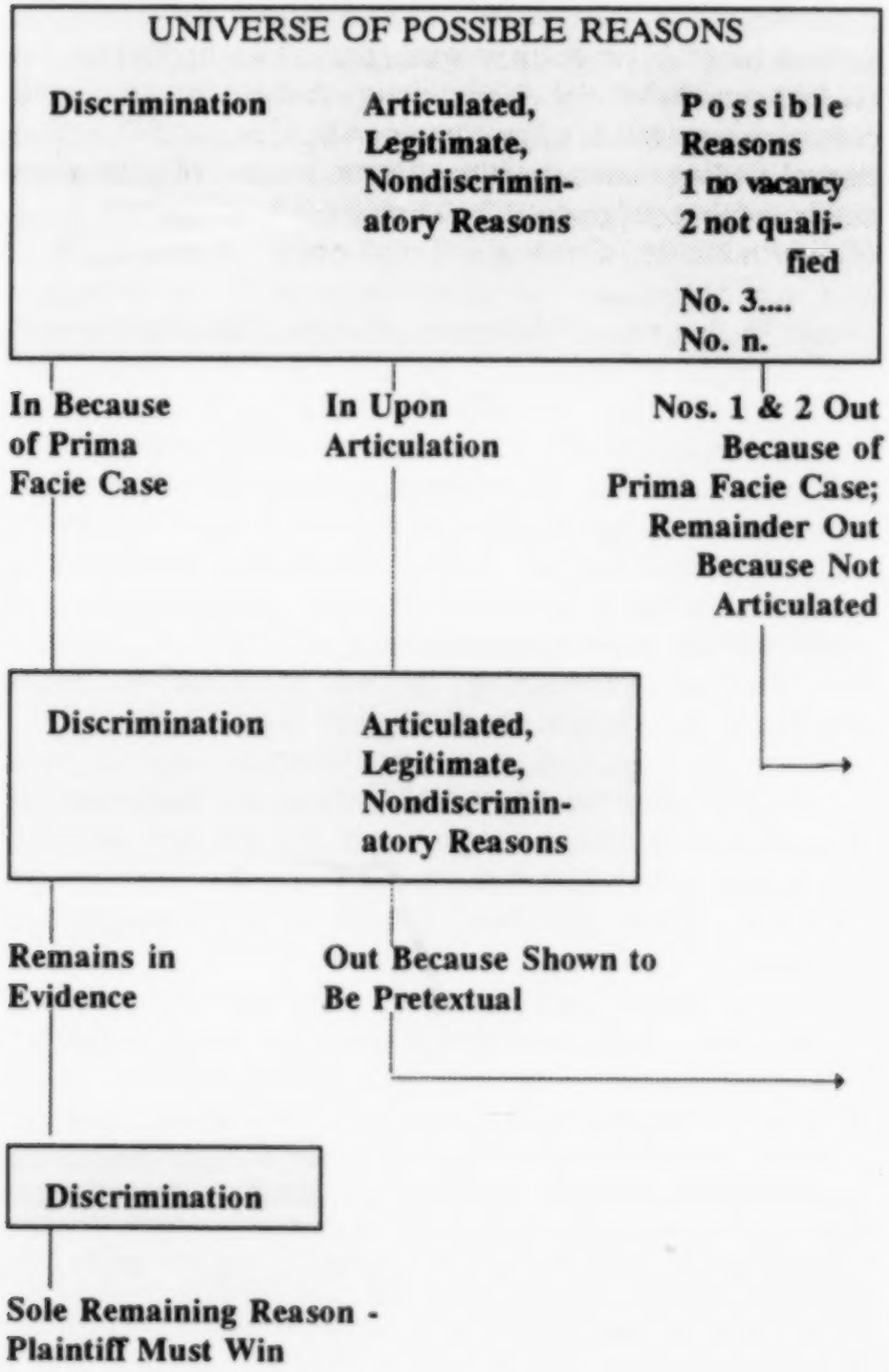
[3]Petitioner's semantic argument that proof of "pretext" must instead mean proof of "pretext *for* discrimination" confuses separate analytical steps: The plaintiff's evidentiary burden is to prove only that the articulated reasons were not the employer's true reasons; the consequence of so doing creates the inference that discrimination was the reason.

MODEL OF PROOF FOR CASE WHERE ARTICULATED REASONS ARE PROVEN FALSE



B. Allowing a Plaintiff Who Proves Only a Prima Facie Case Against a Silent Defendant to be in Better Position than a Plaintiff Who Proves a Prima Facie Case And Rebuts all Proffered Reasons of a Dishonest Defendant is Illogical.

Petitioners' assertion that an employee is not entitled to judgment unless he or she eliminates *all* possible legitimate explanations is inconsistent with *McDonnell Douglas*' holding that an unrebutted prima facie case requires the entry of judgment for the plaintiff.

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of that presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 450 U.S. at 254.

In the circumstances described by *Burdine,* the plaintiff clearly has not -- as petitioners argue a plaintiff must -- eliminated all *possible* legitimate reasons for the disputed action. On the contrary, the prima facie case only "eliminates the two most common nondiscriminatory reasons for the action." *Burdine,* 450 U.S. at 254. The theoretical possibility that some nondiscriminatory reason underlies the conduct at issue is not sufficient to create an issue of fact, or prevent entry of judgment for plaintiff, since mere speculation as to the existence of some legitimate explanation is not sufficient to overcome the weight of the evidence creating the prima facie case. *See Bazemore v. Friday,* 478 U.S. 385, 403 n.14 (1986); *Patton v. Mississippi,* 332 U.S. 463, 466-468 (1947). A "possible" legitimate

explanation is sufficient to create an issue of fact only if and when it is set forth by the defendant through the introduction of admissible evidence.

When an employer does articulate, through evidence, a particular non-discriminatory reason, it creates an issue of fact with regard to *that* proffered reason. But the articulation and substantiation of one such reason does not create an issue of fact with regard to all, or any, of the other conceivable reasons. If the petitioners in this case had offered no defense whatever, the district court could not have ruled for petitioners on the theory, for example, that respondent had failed to prove he was not dismissed for chronic absenteeism.

In the instant case, petitioners, as contemplated by *McDonnell Douglas,* articulated through admissible evidence two specific alleged legitimate motives -- the severity and accumulation of disciplinary infractions. As to each but only as to these there was undeniably an issue of fact. These proffered reasons were the primary focus of the trial, and the district judge decided in favor of respondent with regard to both of those factual issues, holding that neither of the articulated reasons was the actual basis for respondent's dismissal. But, once the district court had rejected the two proffered reasons the case returned to a similar evidentiary posture to where it was before the petitioners offered any explanation of their conduct.[4] Indeed, the position of

[4] Of course the original presumption legally mandated by the creation of the prima facie case under *McDonnell Douglas* was discharged when the petitioners met the burden of production. See FED. R. EVID. 301. However, the evidence which gave rise to the original prima facie case *remained in the record* unrebutted. The inference that evidence generated continued to be that employers are likely to act for *some* reason, and absent any legitimate reason, it is more likely than not that the basis of the decision was impermissible discrimination. *Furnco,* 438 U.S. at 577.

respondent following the trial was even better than would have been the case had the petitioners merely remained silent, because the district judge had affirmatively rejected two possible explanations. As Petitioners candidly concede, the unsuccessful proffer of "a phony reason" provides support for an inference "that the employer is trying to conceal a discriminatory reason for his action." Pet.Br. 15 n.3.

A defendant which unsuccessfully offers a "phony reason" logically cannot be in a better legal position that a defendant who remains silent, and offers no reasons at all for its conduct. In both situations there is no articulated non-discriminatory reason to explain away the evidence and inference offered by plaintiffs. The theoretical possibility, present in both situations, that there is some unarticulated legitimate reason is not by itself sufficient to create an issue of fact.

C. It is Well-Established that Rebuttal of the Articulated Reasons Serves to Discharge the Plaintiff's Ultimate Burden of Proof of Discrimination.

Petitioners' argument that a plaintiff must eliminate all legitimate reasons for a disputed employment action squarely contradicts the entire line of *McDonnell Douglas* cases, which require a plaintiff only to discredit the employer's proffered explanation. In *Aikens*, a more recent application of *McDonnell Douglas*, all members of the Court agreed that it was error to require that the plaintiff submit direct evidence of discriminatory intent. *Aikens*, 460 U.S., at 714 n.3, 717. The *Aikens* Court reaffirmed that plaintiff discharges of his ultimate burden of persuasion by either of two choices: proving directly that a discriminatory reason more likely motivated the employer "'or indirectly by showing that the employer's proffered explanation is

unworthy of credence.'" *Id.*, at 716, *quoting Burdine*, 450 U.S., at 256. *See also Aikens*, 460 U.S., at 717, 718 (Blackmun, J., concurring) ("the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision.")

Recently, in *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989), the Court again affirmed the plaintiff's right to demonstrate that the employer's proffered reasons for its decision "were not its true reasons." The *Patterson* Court found too narrow the district court's instruction that plaintiff could carry her burden of persuasion only by showing that she was better qualified than the while applicant who got the job; the majority held that the plaintiff "may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual." *Id.*, 491 U.S., at 188. *See also Price Waterhouse v. Hopkins*, 490 U.S. 490, 247 n.12 (1989) (plurality opinion by Brennan, J.) (noting that a plaintiff may prevail under *Burdine* if she proves "that the employer's stated reason for its decision is pretextual); *Id.*, 490 U.S., at 261 (1989) (O'Connor, J., concurring) (distinguishing mixed-motive cases as "a supplement to the careful framework established by our unanimous decisions" in *McDonnell Douglas* and *Burdine*); *Id.*, 490 U.S., at 287 (Kennedy, J., dissenting) (emphasis in original) (restating the *Burdine* test that "a plaintiff may succeed in meeting her ultimate burden of persuasion '*either* directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'"). And -- notwithstanding the recent decisions of the few circuits relied on by Petitioner -- the overwhelming majority of the courts of appeals agree with the court below that *McDonnell Douglas* dictates entry of judgment for the plaintiff upon proof that all of the employer's articulated reasons are a

unworthy of credence.[5]

The Equal Employment Opportunity Commission, the agency responsible for enforcement of Title VII, last year also explicitly reaffirmed the *McDonnell Douglas* model of indirect proof. *See* Recent Developments in Disparate Treatment Theory, EEOC Advance Policy Guidance N 915.002 (approved by 4-0 vote July 7, 1992), Lab. L. Rep. (CCH) 449 Issue No. 493, Part 2 (July 20, 1992). The

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[5]*See, e.g., King v. Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985) ("*Burdine* makes it absolutely clear that a plaintiff who establishes a prima facie case of intentional discrimination and who discredits the defendant's rebuttal should prevail."); *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 161 (2d Cir.), *cert. denied*, ___ U.S. ___, 116 L.Ed.2d 185 (1991) (explaining that to show "pretext, a plaintiff need not directly prove discriminatory intent. It is enough for the plaintiff to show that the articulated reasons were not the true reasons for the defendant's actions"); *Ibrahim v. New York State Dep't of Health*, 904 F.2d 161, 168 (2d Cir. 1990) (demonstrating that defendant's proffered explanation was not the true reason for its decision meets plaintiff's ultimate burden of persuasion); *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1000 (3rd Cir. 1988) ("A showing that a proffered justification is pretextual is itself equivalent to finding that the employer intentionally discriminated."); *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 639-40 (5th Cir. 1985) (disproving the proffered reasons "recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reasons for the employer's decision, we presume that the employer was motivated by discriminatory reasons"; "Thus, in our view, unlike Humpty Dumpty, the employee's prima facie case can be put back together, through proof that the employer's proffered reasons are pretextual"); *MacDissi v. Balmont Industries*, 856 F.2d 1054, 1059 (8th Cir. 1988) (once fact finder is persuaded that proffered reason is not true reason, proof of intentional discrimination "unjustifiably multiplies the plaintiff's burden"); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1554 (11th Cir. 1990) (proving the proffered reason is not worthy of belief "satisfies the required ultimate burden of demonstrating by a preponderance of the evidence that he or she has been the victim of intentional racial discrimination").

EEOC found the command of *Aikens* and *Burdine* "clear": "a plaintiff can prevail *either* by proving that discrimination more likely motivated the decision *or* that the employer's articulated reason is unworthy of belief." *Id.*, at 4 n.5 (emphasis in original). It concluded:

> Thus the Commission disagrees with those courts that have held that this is not enough to prevail for a plaintiff to disprove the employer's articulated reason. *See, e.g., Galbraith v. Northern Telecom*, 944 F.2d 275, 282-83 (6th Cir. 1991); ... *Mesnick v. General Electric*, 950 F.2d 816, 824 (1st Cir. 1991) ....

Ibid.

Congress has not altered the *McDonnell Douglas-Burdine* test and its widespread use in the court of appeals. This silence, in light of its recent and extensive amendments of the burdens of proof and persuasion in other types of Title VII claims, suggests its approval of this method of indirect proof of Title VII claims. *See, e.g.*, The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1074, 1074-75 (overruling *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), with respect to the burden of proof in disparate impact cases); *Id.* § 107, 105 Stat., at 1075-76 (overruling *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), regarding proof and remedies in mixed motive cases).

D. The Court of Appeals Correctly Followed *McDonnell Douglas* in Holding that Respondent's Rebuttal of the Petitioner's Reasons Entitled Him to Judgment.

The Court of Appeals for the Eighth Circuit correctly applied the *McDonnell Douglas* analysis to this case. Pet. App. A-1 to -12. The court accepted the district court's findings, which are undisputed here, that Respondent had

proved a prima facie case of discrimination in his demotion and termination, that the Petitioners had articulated only two reasons for their actions, and that Respondent had proved by a preponderance of the evidence that both of those reasons were not credible. Pet. App. A-8.

However, rather than concluding its inquiry, the district court added speculations of its own, suggesting that although Respondent had proven the existence of a crusade to terminate him "he has not proven that the crusade was racially rather than personally motivated." Pet. App. A-27. The court of appeals found that the district court's "assumption" of a motivation was never claimed by defendants. Pet. App. A-10. Following *McDonnell Douglas*, the court below correctly held that the *defendant* must introduce evidence to clearly frame its reasons for the plaintiff's rejection. *Ibid.* Following *Furnco* and *Burdine*, the court then properly held that since the Respondent met his burden of rebutting all of the defendants' proffered reasons, as a matter of law he "satisfied his ... ultimate burden of persuasion. No additional proof of discrimination is required." Pet. App. A-11.

II. CREDITING UNARTICULATED REASONS DEPRIVES A PLAINTIFF OF HIS FULL AND FAIR OPPORTUNITY TO PROVE HIS CASE.

A. *McDonnell Douglas* Requires the Employer to Frame Clearly the Factual Issues so the Plaintiff Has a Full and Fair Opportunity for Rebuttal.

A plaintiff would not in any meaningful sense be accorded "his day in court" if he does not know what explanations by his employer he must disprove at trial. *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985). Fundamental fairness demands that the plaintiff have

sufficient notice to develop and present evidence, and effectively examine witnesses at trial.[6]

The *McDonnell Douglas* inquiry safeguards both parties opportunity to respond to relevant issues by requiring each party to frame the facts. In order to discharge satisfactorily its burden of production under *McDonnell Douglas*, the employer must "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S., at 255-56. *See also Aikens*, 460 U.S. at 716 n.5 (*quoting Burdine*, 450 U.S. at 256) (cautioning that "[o]f course, the plaintiff must have an adequate 'opportunity to demonstrate that the proffered reason was not the true reason...'"); *Patterson*, 491 U.S., at 187 ("Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons.")

The clarity of the proffered reasons is sharpened by the additional requirement that, to be legally sufficient, the employer's explanations must be admitted into evidence; "the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." *Burdine*, 450 U.S., at 255 n.9. Insofar as the relevant question is what motivated the employer at the time of the action, there is no reason to allow employers, after trial, to have a second bite at the apple.

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[6]*Cf. Lankford v. Idaho*, 500 U.S. ___, 114 L.Ed.2d 173 (1991) (holding that capital defendant, in preparing for sentencing hearing, did not have the notice required by due process that the judge might sentence him to death based on facts in the trial record, when the state had responded in the negative to the court's earlier order requiring it to reveal whether it would seek death).

The denial of an opportunity to rebut an explanation is even more egregious when the explanation is first "proffered" in the decision of the district court. In *Lanphear v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983), the court of appeals reviewed a decision in which the district court had granted judgement for the defendant on a ground completely different from that which the employer claimed. Finding that the defendant's omission of this reason failed to meet the notice requirement of *Burdine*, Judge Wilkey, writing for an unanimous court, held: "It should not be necessary to add that the defendant cannot meet its burden by means of a justification articulated for the first time in the district court's opinion." *Id.*, 703 F.2d, at 1317 & n.39.[7]

Judge Wilkey summed up the fundamental flaw of the district court's sua-sponte defense:

> The district court's substitution of a reason of its own devising for that proffered by appellees runs directly counter to the shifting allocation of burdens worked out by the Supreme Court in *McDonnell Douglas* and *Burdine*. The purpose of that allocation is to

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[7]*Lanphear*'s reasoning that a non-articulated reason cannot meet the defendant's step two burden is analytically consistent with the presumption of discrimination that governs cases in which a defendant articulated no reasons at all. In *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425 (5th Cir. 1984), the defendant had never articulated reasons for its failure to promote plaintiff, despite its argument on appeal that such reasons could be found in plaintiff's witnesses' testimony. The court of appeals found that even though it was *possible* that these facts could be legitimate reasons, the "difficulty" in this case was that "the defendant never articulated to the magistrate that these *were in fact* the reasons for the particular challenged action." *Id.*, 738 F.2d, at 1429 (emphasis in original). The court affirmed the district court's finding of discrimination because the defendant had failed to rebut plaintiff's prima facie case. *Id.* at 1430-31.

> focus the issues and provide plaintiff with 'a full and fair opportunity' to attack the defendant's purported justification. That purpose is defeated if defendant is allowed to present a moving target or, as in this case, conceal the target altogether.

Lanphear, 703 F.2d, at 1316.

Other courts of appeals have recognized that *McDonnell Douglas* precludes trial judges from crediting speculative explanations never offered by a defendant. *See, e.g., Equal Employment Opportunity Comm'n v. West Bros. Dept. Store*, 805 F.2d 1171, 1172 (5th Cir. 1986) ("The trial court may not assume this task [of articulating a legitimate reason]; '[i]t is beyond the province of a trial or a reviewing court to determine -- after the fact -- that certain facts in the record might have served as the basis for an employer's personnel decision'.... We are concerned with what an employer's actual motive was; hypothetical or *post hoc* theories really have no place in a Title VII suit.")(*quoting Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1430 (5th Cir. 1984)); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 376 (6th Cir. 1984) (Trial court's "finding" of an instance of plaintiff's poor judgment was irrelevant, "since defendant never claimed that the incident was a reason for failing to promote plaintiff");

B. Allowing the Defendant to Benefit from Unarticulated Reasons by Escaping Scrutiny for Pretext is Detrimental to Truth-Seeking and Efficiency.

The clear articulation of an employer's reasons, in rebuttal to a plaintiff's prima facie case, helps narrow the focus of the litigation. The burden-shifting process will flush out, on plaintiff's rebuttal, relevant evidence about the proffered reasons and best reveal whether a given answer is

true.[8] Unarticulated reasons that are allowed to remain hidden from the harsh light of this adversarial process should not be given evidentiary weight. *See* Marina Szteinbok, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims after* Aikens, 88 COLUM. L. REV. 1114, 1130-32 (1988) (allowing defendants to prevail on unarticulated reasons "would distort the truth seeking process by failing to test factual premises adversarially.")

In addition, crediting only those legitimate nondiscriminatory reasons timely and clearly articulated -- and discrediting all others -- acknowledges the superior knowledge of the employer. The employer is in full control of the knowledge and evidence of its actions. *See Teamsters*, 431 U.S., at 359 n.45. A judicial process unrelated to an employer's actual proffered explanations has none of the indicia of reliability accorded to normal, adversarial proceedings. Given the court's customary reliance on a litigant to select the interpretation of the facts most favorable to his own case, to allow a fact finder to ascribe to the employer reasons it did not articulate would jeopardize the truth-seeking functions.

Respondent agrees that "Title VII does not compel every employer to have good reasons for its deeds,"[9] but surely Title VII compels every employer to articulate what those reasons are. "Ferreting out this kind of invidious discrimination is a great, if not compelling, governmental

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[8]"No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J.)

[9]Pet. Br. at 21, *quoting Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987).

interest," and it is reasonable and logical to place the burden of articulating reasons for hiring decisions on defendant employers. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) (unanimously holding that the EEOC may subpoena peer review materials from a university in spite of its common law, evidentiary, and First Amendment objections).[10]

Petitioners present a litany of reasons that Title VII defendants might prefer not to articulate. Pet. Br. at 18. What Petitioners fail to provide is any explanation of why an employer should be exempted from articulating those reasons, however embarrassing or inconvenient, as *McDonnell Douglas* requires. If employers could withhold knowingly their real reasons with no fear of consequence, even if a plaintiff proved its proffered reasons to be pretextual, then the truth-seeking inquiry would cease to have any meaning.[11] This rule would create incentives that are directly counter to the truth-seeking process.

Basic principles of evidence and common law waiver support a policy of disallowing belated reasons. The defendant is the master of his case and controls the evidence relating to the real reasons for its actions. It fairly bears the responsibility for its choices and the risk that plaintiff will disprove any pretextual reasons and therefore prevail. Where an employer deliberately chooses, for whatever tactical or other reason, not to advance some additional plausible justification for its actions, that waiver is binding on the employer and court alike. *See, e.g., Nation-wide Check v. Forest Hills Distribs.*, 692 F.2d 214, 217 (1st Cir.

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[10]Tactics less draconian than silence, such as protective orders, may ameliorate employers' concerns. *See* FED. R. CIV. P. 26(c).

[11]Deliberately misleading the court with sham testimony in order to meet the burden of production could, of course, risk other penalties. *E.g.*, 42 U.S.C. § 1621 (perjury).

1982) (*quoting* Wigmore on Evidence § 291, at 228 (Chadbourn rev. 1979) that non-production of a relevant document "'is evidence *from which alone* its contents may be inferred to be unfavorable to the possessor'"). *See also Michigan v. Lucas*, 500 U.S. ___, 114 L.Ed.2d 205 (1991) (statute requiring a rape defendant to file written notice and an offer of proof regarding a prior relationship with alleged victim within ten days of arraignment or risk possible preclusion of that evidence did not *per se* violate the Sixth Amendment, and might serve legislative ends, increase evidence, and enhance fairness).

Finally, articulation of reasons by the employer reduces the number of issues for the parties and fact finder, which conserves resources while focusing the parties on the most relevant issues. Petitioner argues that, in addition to proof of pretext, it is the plaintiff's burden to "prove the absence of any other justification supported by the record." Pet. Br. 16. Petitioner would allow -- indeed, oblige -- the finder of fact to consider not only the defendant's articulated reasons for its action and the plaintiff's allegation of a discrimination, but also to consider and reject all conceivable reasons that could have motivated the employer.

Petitioners' approach would squander judicial resources. All factual issues, even if vehemently denied by all parties, would remain in play. The plaintiff and fact-finder would have to assume responsibility for extracting from the record and resolving every conceivable reason for the action. The courts would be plunged standardless into a sea of defenses where every possible motivation and every shred of indirect and direct evidence might matter, multiplying litigation. This would be particularly ill-advised just as Congress has provided a right to jury trials in Title VII, *see* Civil Rights Act of 1991, Pub. L. 102-166 § 102(c),

105 Stat. 1073.[12]

C. The Confusion of the Present Record Demonstrates Why Crediting Unarticulated Reasons Undermines the Truth-Seeking Function of the Adversarial Process.

The central factual question of this litigation is one that Petitioners, three years after trial, still have not answered: What in fact was the reason that Steve Long and St. Mary's Honor Center demoted and fired Melvin Hicks? If Petitioners' answer is that personal animosity of John Powell was the reason, then Mr. Long and other defense witnesses gave false testimony at the trial, yet now seek the additional reward of escape from the judgment below. If Petitioners' answer is not John Powell's personal animosity, then Petitioners' factual basis for defeating the inference of discrimination dissolves.

The confusion in the factual record on which this petition rests — illustrates the danger of bypassing *McDonnell Douglas*' requirement of producing sufficient notice of the employer's reasons for its actions. Had the reason found by the district court been timely articulated by Petitioners, there is no doubt that the trial below would have been completely different.

The district court found that:

> It is clear that John Powell had placed plaintiff on the express track to termination. It is also clear that Powell received the aid of Ed Ratliff and Steve Long in this endeavor. The question remains, however, whether

[12]One can imagine the chaos if each juror, each on the basis of a *different* speculative reason, found for a defendant.

> plaintiff's race played a role in their campaign.

Pet. App. A-26. Of course, the question that the district court posed probably would have been answered during the trial had the Petitioners ever expressed that Powell's personal animosity or his endeavors against the plaintiff were the reason for their actions.

However, Respondent had no notice that Petitioners, much less the trial judge, might suggest that *personal*, rather than *racial*, animosity motivated them.[13] Certainly the testimony would not suggest that Petitioners would defend the charges on that ground. John Powell flatly denied any personal difficulty with Melvin Hicks: "I can't say that there was difficulties between he and I. At no time was there any kind of personal --" J.A. 46.

More importantly, Petitioners never claimed that any *decisionmaker* had personal animus or took Powell's purported animosity into account in demoting or discharging the Respondent. Vincent Banks, a member of the disciplinary committee that had recommended suspension when Respondent was terminated, did not mention any animus of Powell, himself, or the other committee members. Tr. 3-2 to 3-51. Similarly, Petitioner Long did not mention any animosity by Powell -- or himself -- towards Respondent,

[13]With proper notice, Respondent could have examined whether the "crusade" that the district court found against Hicks was "racially rather than personally motivated," Pet. A-27, and could have explored the extent to which the personal animosity was related to Respondent's race. With fair notice and opportunity to prove his case, Respondent could have investigated the actions of Powell and the actions and motivations of other white men who the court found assisted him -- Ed Ratliff and Petitioner Long. Respondent could have discovered whether other "crusades" were carried on against other supervisors and officers at St. Mary's.

and claimed that Respondents' history of infractions motivated him, a reason found incredible by the district court.[14]

Five months after trial, Respondents' counsel, Gary Gardner, summarized defendants' position consistent with their trial testimony. Defendants' Proposed Findings of Fact and Conclusions of Law (Nov. 30, 1989). Not one of the 41 proposed findings or conclusions allege that any of the defendants harbored personal animus toward Mr. Hicks. *Id.*, 1-13.[15] Similarly, in the court of appeals, Petitioners reported that *they* had "adduced evidence of legitimate, non-discriminatory reasons for Hick's demotion and discharge,

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[14]The Director of the Division of Adult Institutions, Donald Wyrick, who would make the final discharge decision, did not testify at all.

[15]The proposed conclusions regarding defendants' burden read in full:

> "Defendants produced evidence, however, of legitimate and nondiscriminatory reason [sic] for each of their employment decisions, the shift change, suspension, demotion and dismissal. The shift change was ordered to broaden the experience of plaintiff, the suspension was order as a result of plaintiff's not performing his duties as shift commander on March 3, 1984, to have the front officer at this post, to have the roving patrol officer make periodic reports, and to keep the visiting areas lights on. The demotion was order as a result of plaintiff not ensuring on March 17, 1984 that the use of a state vehicle, and the purpose of its use, was logged in the vehicle control and shift chronological logs. The dismissal was ordered as a result of plaintiff offering violence to his commanding officer on April 27, 1984, by inviting him to step outside. Though plaintiff denied such an offer, the encounter between plaintiff and his commanding officer was witnessed by a third employee, who testified that plaintiff used words to that effect." Defendants' Proposed Findings of Fact and Conclusions of Law, 14-15 (Nov. 30, 1989).

which were the severity and accumulation of violations of institutional rules," while they stated that the *trial court* had found John Powell's personal animosity. *Hicks v. St. Mary's Honor Center*, 91-1571, Brief of Appellees 3, 15 (Aug. 16, 1991).

In light of the fact that Long, Banks and Wyrick, made the critical decision, and all of their claimed reasons for the actions at issue were found to be pretextual, it is difficult to understand how petitioner can be exonerated on the assumption that Powell had a grudge against Respondent. Respondent, of course, had no notice that the relationship of Powell to these decisionmakers would be at issue.

In any event, Powell's personal animosity, otherwise unexplained, is not mutually exclusive of racial discrimination. Indeed, courts recognize that it is often the very expression of discriminatory motive. *Cf. Miles v. M.N.C. Corp.*, 750 F.2d 867, 871-72 (5th Cir. 1985) ("subjective evaluations involving white supervisors provide a ready mechanism for racial discrimination. This is because the supervisor is left free to indulge a preference, if he has one, for one race of workers over another").[16]

This undeveloped record turns the factual inquiry of *McDonnell Douglas* on its head: Petitioners themselves lead the rebuttal of the reason ascribed to them by the district court. This vague, post-hoc reason cannot, as a matter of law, serve to rebut Respondent's prima facie case evidence

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[16]The court of appeals did question "whether such a hypothetical reason based upon *personal* motivation even could be stated and still be 'legitimate' and 'nondiscriminatory.'" Because the court of appeals found that defendants did not meet *Burdine*'s requirement of a clear articulation with regard to this reason, it found no reason to resolve this question. A-10.

of discrimination.[17]

III. ADOPTION OF THE "PRETEXT PLUS" RULE WOULD REQUIRE DIRECT PROOF OF DISCRIMINATORY MOTIVE.

At the heart of the *McDonnell Douglas/Burdine* model is the principle that intentional discrimination can be established indirectly through circumstantial evidence, and does *not* require direct proof of motive. The "pretext plus" rule urged by petitioners and adopted by the First, Sixth, and Seventh Circuits undermines this principle.

Petitioners, their *amici* and, indeed, the courts that have adopted pretext plus are notably reticent in explaining precisely what kind of evidence a plaintiff must introduce in order to establish the "plus." Their position is clearly that proving pretext, that is, that the reasons offered are not the true reasons, is insufficient. It is necessary to adduce some additional quantum of evidence to establish that the pretext was advanced for the purpose of discrimination. Respondent urges that the reticent is not inadvertent; it is clear that the inevitable consequence of adopting the "pretext plus" rule is to require direct evidence of discriminatory motive.[18]

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[17]If, contrary to the opinion below, personal animosity in this case is held to be legally relevant, then remand for review of this factual finding would be necessary. The court of appeals characterized the district court's view of the motivations as an "assumption" without evidence to support it. A-10.

[18]*See generally*, Catherine Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 99 (1991). Lanctot notes that some pretext-plus courts have usurped the role of the fact finder in determining the credibility and weight of statements, and have kept

As discussed in Part I, *supra*, *Burdine* holds that a plaintiff may demonstrate pretext "*either directly* by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256 (emphasis added). Respondent maintains that *Burdine*'s use of the disjunctive, on its face, means simply that a plaintiff may discharge his ultimate burden of persuasion by proof of *either* of the stated options. That is, a plaintiff may prove directly that discrimination was the motive, or may, to equal effect, demonstrate discrimination indirectly by proving that the stated reasons are themselves not credible. Thus, for the reasons discussed above at length, proof of pretext without more discharges the plaintiff's ultimate burden of persuasion, and compels judgment for him.

Petitioner and their *amici*, in contrast, deny that rebuttal of the employer's articulated reasons is necessarily sufficient to discharge plaintiff's burden of persuasion. Their argument necessarily negates the second part of the *Burdine* rule as an alternative method of proceeding, and submerges it into the first method of proving pretext, namely through direct evidence of motive. Imposing an utterly new requirement of some undefined *additional* proof of discrimination onto the final step of the *McDonnell Douglas/Burdine* test, would effectively overrule the entire line of *McDonnell Douglas* cases. Thus, the reach of Title VII would be limited to only the most blatant "smoking gun" violations.

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cases with direct evidence of discriminatory animus from the jury, casting substantial "doubt on the [pretext-plus] rule's theoretical underpinning."

IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE EVIDENCE DEMONSTRATED AN ABSENCE OF DISCRIMINATION.

Even if this Court were to decline to apply *McDonnell Douglas* to this case, a remand would be necessary. Respondent's claim of retaliation, which was not addressed by the district court, was reserved by the court of appeals. Pet. A-12 n.9. In addition, Respondent contended below that the District Court's findings regarding other evidence of discrimination were erroneous as a matter of law and fact.

Thus, the district court erred as a matter of law in relying on the racial composition of the disciplinary review boards to discount the evidence of their discriminatory actions against Respondent. Although the board's actions were characterized by the court as "harsh," the court concluded that they could not have been discriminatory because black as well as white persons sat on the boards. Pet. App. A-28. This Court has rejected the reasoning "that human beings would not discriminate against their own kind — in order to find that the presumption of purposeful discrimination was rebutted." *Castaneda v. Partida*, 430 U.S. 482, 500 (1977). Reliance solely on the board's composition, rather than findings about its operation and reasons for acting was therefore error. Further, the district court's conclusion overlooked the fact that the decision to fire Respondent by Mr. Long overruled the board's recommendation that he merely be suspended.

Similarly, the district court's holding that the fact that thirteen blacks were hired to work at the St. Mary's somehow was proof that the decision to *fire* Hicks was not discriminatory was wrong as a matter of law. The claim in this case is that Hicks was fired in order to get rid of black supervisors, a claim buttressed by the facts that 12 out of the

13 persons fired were black and that the number of black supervisors declined from 5 of 6 to 2 of 6. The hiring of lower-level black correctional officers (and, incidentally, Mr. Long did not have control over such officers, J.A. 66, 67) in no way disproves that claim. Nor did the fact that *if* another black had taken a supervisory position then there would have been an equal number of black and white supervisors rebut that claim. *See Furnco*, 438 U.S. at 579 ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.") For the same reasons, the fact that disciplinary action was not taken against Mr. Hick's subordinates, who were also black, is simply irrelevant to his claim.

CONCLUSION

The judgement of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER, ET AL., PETITIONERS

v.

MELVIN HICKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether the plaintiff in an employment discrimination case under Title VII of the Civil Rights Act of 1964 or 42 U.S.C. 1983 is entitled to judgment as a matter of law once he has (i) established a prima facie case and (ii) proved that all permissible grounds advanced by the defendant in support of its actions are unworthy of credence.

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the method by which a plaintiff may prove intentional employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1983. The Attorney General and the Equal Employment Opportunity Commission (EEOC) share substantial responsibility for the enforcement of Title VII. The EEOC also has primary responsibility for interpretation and enforcement of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, and

the courts have applied the same order and standards of proof to claims of age discrimination under the ADEA. See, *e.g.*, *Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285, 289 (8th Cir. 1982), cert. denied, 459 U.S. 1205 (1983). The resolution of this case will directly affect the government's discharge of these responsibilities. The EEOC participated as amicus curiae in support of respondent in the court of appeals, and the United States has previously participated in cases in this Court involving similar issues, including *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983), as well as in numerous other cases under Title VII and the ADEA.

STATEMENT

1. Respondent Melvin Hicks began work in August 1978 as a correctional officer at petitioner St. Mary's Honor Center, a minimum security state prison in St. Louis, Missouri. Pet. App. A2, A28. In February 1980 he was promoted to shift commander, a supervisory position. *Id.* at A2. Prior to the events at issue in this case, respondent had never been suspended, "written up," or otherwise subjected to any disciplinary action. *Id.* at A3.

In January 1984 the superintendent of St. Mary's, Arthur Schulte, was demoted and transferred to another institution in response to complaints about management of the prison. Pet. App. A15. He was replaced by petitioner Steven Long. *Ibid.* Both Schulte and Long are white. *Id.* at A2, A15 n.1. At the same time, the chief of custody and two shift commanders, all of whom were black, were removed

and replaced by white employees.[1] *Id.* at A15 & nn.1, 3. John Powell became chief of custody and respondent's immediate supervisor. *Id.* at A2. Re-spondent and another black shift commander were initially retained as part of the new administration.

In March 1984, respondent was suspended for five days after an incident in which other officers arriving at St. Mary's during respondent's late-night shift discovered that the front-door officer and another guard were away from their posts, the "control center" officer was required to leave his post momentarily to open the door, and the first floor lights were turned off. None of the officers directly involved was disciplined. Powell testified at trial that it was his policy to discipline only the shift commander for violations occurring during his shift.[2] Pet. App. A16-A17.

Two weeks later, respondent properly authorized use of a St. Mary's vehicle by two officers. Those two officers and the control center officer all failed to enter the use of the vehicle in an official log, as required by prison rules. The disciplinary review board recommended that respondent be demoted from shift commander to correctional officer for that failure. Powell, who was a member of the review board, voted to terminate respondent. Again, none of

[1] The position of chief of custody was first offered to a black employee, who declined the offer. Pet. App. A15 n.2.

[2] Powell was responsible for initiating disciplinary proceedings. A four-person disciplinary review board would then make a recommendation to the superintendent of St. Mary's, who would in turn make a recommendation to the director of the state prison administration. See Pet. App. A17 n.6.

the other individuals involved was disciplined. Shortly after this incident, but before his demotion, respondent was reprimanded for failing to investigate an inmate fight, although he had given Powell a memorandum about the incident and ordered a subordinate to submit a report. Pet. App. A17-A18 & n.7.

When respondent was informed of his demotion, he asked for and was given the rest of the day off. As respondent was leaving the meeting, Powell followed and ordered him to open his locker so that Powell could retrieve respondent's copy of the shift commander's manual. Respondent refused, and indicated in the ensuing confrontation that he would "step outside" with Powell. Powell sought disciplinary action against respondent based on the "threats" made during this confrontation, and a disciplinary board recommended that respondent be suspended for three days. Superintendent Long instead recommended that respondent be fired, based on the "severity and accumulation" of his violations. Respondent was fired on June 7, 1984. Pet. App. A18-A19.

2. Respondent then commenced this action, alleging that petitioners had demoted and fired him because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1983.[3] Pet. App. A14. Petitioners defended

[3] Respondent sued St. Mary's under Title VII and Long under 42 U.S.C. 1983. Because the issues and standards are not materially different, we will refer only to Title VII. See Pet. App. A6-A7 (and cases cited); cf. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 186 (1989) (framework of proof developed under Title VII applies to cases under 42 U.S.C. 1981).

on the ground that "the severity and the accumulation of violations committed" by respondent supplied legitimate, nondiscriminatory reasons for demoting and firing him. *Id.* at A23; see Pet. Br. 8.

a. Respondent introduced evidence intended to show that the reasons petitioners offered for their actions were unworthy of credence. With respect to the five-day suspension in March, respondent showed that on two occasions that same month he had reported that no front-door officer was present when he arrived at St. Mary's during the shift commanded by officer Sharon Hefele, who is white. The control center officer stated that Officer Hefele had ordered him to open and close the front door, which required him to leave his assigned post. Despite the close similarity between those incidents and the one for which respondent was suspended, no one was ever disciplined for those incidents. Pet. App. A19-A20, A24-A25.

Similarly, respondent had reported on another occasion that during Officer Hefele's shift the doors to the main power room and the annex building were unlocked, in violation of regulations, yet the prison administration took no action. A white officer who took a set of prison keys home with him was never disciplined. And a white officer who admitted that, as an acting shift commander, he had actually allowed an inmate to escape received only a letter of reprimand.[4] Pet. App. A20, A25-A26.

[4] The district court noted that so far as appeared from the record, that reprimand was the only discipline meted out to any officer other than respondent during the period at issue in this case. Pet. App. A27. Apparently, the only dispute among

The incident that resulted in respondent's March suspension was reported by a white officer, Ed Ratliff. Pet. App. A16, A19 n.8. On the day of that incident, Ratliff permitted an unescorted inmate to climb into the prison superintendent's office to retrieve some work passes locked inside. When respondent brought this incident, which the district court termed a "striking and obvious breach of security," to Powell's attention, Powell took no disciplinary action, but commended Ratliff for "defusing a volatile situation." *Id.* at A19 & nn.9-10, A25. On another occasion, Ratliff brought his brother, a deputy marshal, to St. Mary's, and directly countermanded respondent's instruction that the brother check his gun while inside the prison. Although respondent reported the incident, Powell refused to recommend discipline against Ratliff. *Id.* at A19.

Finally, ten days before respondent's confrontation with Powell, respondent had reported to Powell that a white subordinate had become indignant at receiving a low service rating and had cursed respondent with "highly profane language." Pet. App. A20. Powell concluded that the subordinate was "merely venting justifiable frustration," and took no action. *Id.* at A20-A21 & n.14, A26 n.17.

b. After reviewing the evidence, the district court first found that respondent had proved a prima facie case of race discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), by showing

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prison administrators with respect to the escape incident was whether the letter of reprimand should remain in the responsible officer's file permanently, or be removed after six months. *Id.* at A25 n.16.

that he was a member of a protected class, that he had the necessary job qualifications for the position of shift commander, that he had a satisfactory record in that position until the change of administration at St. Mary's, and that after he was demoted the position of shift commander remained open and was then filled by a white employee. Pet. App. A22-A23. The district court further found that petitioners had carried their burden of production at the second stage of the *McDonnell Douglas* framework by articulating non-discriminatory reasons for their actions—namely, the severity and accumulation of violations committed by petitioner. *Id.* at A23.

Finally, the district court found, at the third stage of the *McDonnell Douglas* framework, that respondent had "carried his burden in proving that the reasons given for his demotion and termination were pretextual." Pet. App. A26; see *id.* at A23-A26. The court observed that respondent was "mysteriously the only person disciplined for violations actually committed by his subordinates," *id.* at A23-A24, noting that a white shift commander was never disciplined for similar or more serious infractions occurring on her shift. *Id.* at A24-A25. Although Superintendent Long had testified, "rather sheepishly," that he considered the vehicle log incident "a serious violation for which harsh discipline was justified," the court found that contention unconvincing in light of the fact that "much more serious violations, when committed by [respondent's] co-workers, were either disregarded or treated much more leniently." *Id.* at A25. Finally, the court found that respondent had been "provoked" into the final confrontation with Powell, and that "the evidence

suggests that Powell manufactured the confrontation * * * in order to terminate plaintiff." *Id.* at A26.

Although respondent had proved that the only reasons advanced by petitioners were pretextual, the district court nevertheless entered judgment for petitioner. Pet. App. A27-A30. The court was of the view that even after demonstrating that petitioners' reasons were not worthy of credence, respondent "still [bore] the ultimate burden to prove that race was the determining factor in [petitioners'] decision," *id.* at A26, and it concluded that respondent had not proved that the actions taken against him were "racially rather than personally motivated," *id.* at A27.

The court pointed to no specific evidence in the record that Powell, Long or other prison administrators harbored any personal animosity against respondent, independent of his race. It did note that no action was taken against black subordinates who had actually committed two of the violations for which respondent was disciplined, and that there were black members of the disciplinary review boards convened to consider respondent's violations. *Id.* at A27-A28. The court also concluded that neither the general pattern of personnel changes at St. Mary's nor the reduction in the number of blacks in supervisory positions raised an inference of racial discrimination, and that neither Long nor Powell had been aware, prior to the 1984 personnel changes, of a 1981 study that had concluded that "blacks possessed too much power at St. Mary's."[5] *Id.* at A27-A28.

[5] The district court described the study as "a comprehensive comparison of [the honor centers in St. Louis and Kansas City,] which discussed the shortfalls and suggested means of improvement. In a section toward the end of the study [the author] pointed out that too many blacks were in positions of power at St. Mary's, and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real. No witness for the defendants admitted he was aware of [this] study at the time of the 1984 personnel changes." Pet. App. A21. See PX 1.

3. The court of appeals reversed and ordered entry of judgment for respondent. Pet. App. A1-A12. It reasoned that the district court's "unequivocal factual finding" that petitioners' asserted reasons for their actions were pretextual, *id.* at A11, left petitioners "in a position of having offered no legitimate reason for their actions," and "in no better position than if they had remained silent" in the face of respondent's prima facie case, *id.* at A10. "Once [respondent] proved all of [petitioners'] proffered reasons for the adverse employment actions to be pretextual," the court held, "[respondent] was entitled to judgment as a matter of law," without any need for further evidence of discrimination. *Id.* at A10-A11. Thus, the court concluded, it was improper for the district court to have rejected respondent's claim by "assum[ing]—without evidence to support the assumption—that [petitioners'] actions were somehow 'personally motivated.'" *Id.* at A10.

SUMMARY OF ARGUMENT

Respondent alleged that he was demoted and discharged by petitioners because of his race, and the case proceeded under the familiar burden-shifting framework prescribed by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and

subsequent decisions. First, the plaintiff must establish a prima facie case. That initial showing creates a rebuttable but otherwise legally mandatory presumption: if the employer remains silent in the face of the prima facie case, the court must enter judgment for the plaintiff. In order to avoid that result, the employer is required to articulate some clear and reasonably specific nondiscriminatory reason for the challenged employment action. Finally, the plaintiff bears the burden of proving that the reason advanced by the employer was not its true reason, but was merely a pretext for discrimination. This Court has said that that burden "merges" with the plaintiff's ultimate burden of proving illegal discrimination, which may be carried either directly through proof of a discriminatory motive, or indirectly by showing that the employer's proffered explanation is unworthy of credence.

In this case, there is no dispute that respondent made out a prima facie case. Petitioners responded by articulating a facially legitimate reason for demoting and firing respondent: the "severity and accumulation" of his violations of prison rules. The district court found that respondent then carried his final burden of showing that petitioners' proffered reason for their actions was unworthy of belief. The court nevertheless went on to hold that respondent was not entitled to judgment because he had not adduced some further evidence that petitioners' actions were motivated by his race.

As the court of appeals held, that conclusion is inconsistent with this Court's prior decisions. The question is not whether a plaintiff must prove intentional discrimination, which is undisputed, but

how he may prove it. This Court has consistently explained that a plaintiff may carry his ultimate burden indirectly, by discrediting the employer's proffered explanation for its actions. Moreover, a contrary holding would be inconsistent with the premise that an employer that is unable or unwilling to articulate a credible nondiscriminatory reason for a challenged action is more likely than not concealing a discriminatory reason. An employer that remained silent in the face of the plaintiff's prima facie case would be held liable for discrimination; there is no logical justification for putting an employer that fabricates a nondiscriminatory explanation in any better position.

Petitioners argue that even if a plaintiff discredits all nondiscriminatory reasons actually advanced by the employer, the employer should be entitled to consideration by the trier of fact of the possibility that there was some other, unarticulated motivation for the employer's action. But the *McDonnell Douglas* framework of proof is designed to be a sensible and efficient means of bringing litigants and the courts to the ultimate question of discrimination. Because any number of nondiscriminatory reasons *might* have accounted for a typical employment decision, it would not be sensible or efficient to force the plaintiff to attempt to negate every possible such reason. Instead, it is reasonable to require the employer, which is of course in the best position to know its true reasons for acting, to frame specific issues for response by the plaintiff and decision by the court.

Finally, petitioners argue that judgment for the plaintiff should not be compelled where legitimate reasons for the employer's actions, while not articu-

lated by the employer itself, "emerge" from the plaintiff's case or are "suggested" by the employer's other evidence. That argument has little to do with the facts of this case. A fair reading of the district court's opinion reveals at most a wholly unsupported—and therefore clearly erroneous—"assumption" that respondent was actually fired because of personal animosity (unrelated to race) on the part of John Powell, his immediate supervisor. Even persuasive evidence of Powell's "personal" animosity would hardly be conclusive, because final decisions affecting respondent's employment were made not by Powell, but by others in the prison administration. In any event, however, petitioners can point to nothing in the record to indicate that Powell's obvious hostility toward respondent was based on anything other than respondent's race.

ARGUMENT

RESPONDENT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE BASIS OF HIS PRIMA FACIE CASE AND PROOF THAT ALL NONDISCRIMINATORY REASONS PROFFERED BY PETITIONERS TO JUSTIFY THEIR ACTIONS WERE UNWORTHY OF CREDENCE

A. Requiring Respondent To Do More Than Discredit All Nondiscriminatory Explanations Proffered By Petitioners Would Be Inconsistent With The Order Of Proof Established By *McDonnell Douglas* And Subsequent Cases

Respondent alleged that he was demoted and discharged by petitioners because of his race. In a series of cases beginning with *McDonnell Douglas*

Corp. v. *Green*, 411 U.S. 792 (1973), this Court has set forth the "allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252 (1981). The applicable three-step procedural framework has become familiar:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 252-253 (quoting *McDonnell Douglas*, 411 U.S. at 802).

There is no dispute that respondent proved a prima facie case. See Pet. App. A8 & n.7. That threshhold showing "eliminates the most common nondiscriminatory reasons" for the challenged employment action: the plaintiff's lack of qualifications, or the employer's lack of an available position. See *Burdine*, 450 U.S. at 253-254 & n.6; *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). It therefore creates a "legally mandatory," although rebuttable, presumption: if the employer remains silent in the face of the plaintiff's initial

showing, then "the court must enter judgment for the plaintiff." *Burdine*, 450 U.S. at 254 & n.7.

Establishment of a prima facie case requires the employer to "clearly set forth, through the introduction of admissible evidence, the reasons" for its challenged actions. *Burdine*, 450 U.S. at 255. The employer does not bear the burden of *proving* that it was motivated by the legitimate reasons it identifies, and therefore did not discriminate. The employer need only articulate a nondiscriminatory explanation for its actions, supported by sufficient evidence to permit acceptance of that explanation by a rational trier of fact. *Id.* at 255, 257. In this case, petitioners articulated a facially legitimate reason for demoting and firing respondent: the "severity and accumulation" of his violations of prison administration rules. Pet. App. A8; Pet. Br. 8.

Once the employer has articulated a nondiscriminatory explanation for its actions, the plaintiff is accorded "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. The burden of proof on that issue rests with the plaintiff, and "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Ibid.* This Court made clear in *Burdine* that the plaintiff may carry that ultimate burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Ibid.*

The district court in this case found that respondent had carried his burden at the third stage of the

McDonnell Douglas framework "indirectly," by discrediting the only nondiscriminatory explanation proffered by petitioners for their actions. Pet. App. A23-A26. The district court nevertheless went on to hold that respondent was not entitled to judgment, because he had not adduced some further evidence that petitioners' actions were motivated by his race. *Id.* at A27-A29. As the court of appeals correctly concluded, *id.* at A11-A12, that holding is inconsistent with this Court's statement in *Burdine* that a Title VII plaintiff may carry his ultimate burden "by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256.

Relying in part on this Court's later decision in *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983), petitioners argue that the courts should focus on "the ultimate question of discrimination," rather than the details of the *McDonnell Douglas* evidentiary framework.[6] Pet. Br.

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[6] Petitioners rely (Pet. Br. 14, 25-26) on language in *Burdine* stating that the presumption of discriminatory motive raised by the plaintiff's prima facie case "drops from the case" once the employer articulates a nondiscriminatory reason for its actions. 450 U.S. at 255 & n.10. The Court made that passing comment, however, in the course of explaining that although the employer's showing "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence," that initial evidence "and inferences properly drawn therefrom" remain very much part of the case. *Id.* at 255 n.10. The Court noted, for example, that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Ibid.* To be sure, once the employer has carried its burden of production, the plaintiff's mere introduction of evidence to rebut the employer's

15; see also *id.* at 13-16, 25-26. We agree with petitioners that "intentional discrimination is the key factual issue in an employment discrimination case." *Id.* at 26. But that statement of the issue begs the crucial question of *how the plaintiff may prove* "intentional discrimination." As explained above, the Court answered that question squarely in *Burdine*: the plaintiff may make the required showing either through direct evidence of a discriminatory motive, *or* by showing that the employer's proffered explanations are pretextual. Far from altering or undercutting that disjunctive standard of proof, *Aikens* reiterated it *in haec verba*.[7] *Aikens*, 460 U.S. at 716; see also *id.* at 717-718 (Blackmun, J., concurring) ("the *McDonnell Douglas* framework requires that a plaintiff prevail when * * * he demonstrates that the

explanation does not, in itself, resuscitate a "legally mandatory inference" of discrimination. But where, as in this case, the plaintiff has succeeded in *proving* "that the employer's proffered explanation is unworthy of credence," he has carried a burden which, as the Court specifically observed, "merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." *Id.* at 256.

[7] In light of this Court's specific and repeated articulation of this standard of proof in cases directly addressing the issue, we find inexplicable petitioners' attempted reliance on *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289-290 (1982). *Pullman-Standard* held that a factual finding that a particular seniority system was not adopted with discriminatory intent was reviewable only for clear error, and rejected the notion that in that context discriminatory intent could be inferred from evidence of disparate impact. Nothing in the decision suggests that it implicates, let alone undercuts, anything that the Court said a year earlier in *Burdine*—and repeated a year later in *Aikens*.

legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision").

Moreover, a rule that the employer is—or even may be—entitled to judgment in its favor after the plaintiff has convinced the trier of fact that all non-discriminatory reasons put forward by the employer are unworthy of belief would be inconsistent with the premise that an employer that is unwilling or unable to articulate a credible nondiscriminatory reason for a challenged action is more likely than not concealing a discriminatory reason. See *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). That logical inference, which the Court has explicitly stated compels a judgment for the plaintiff if the employer remains silent in the face of a prima facie case (*Burdine*, 450 U.S. at 254 & n.7), is no less compelling where the employer, rather than remaining silent, offers a false explanation for its actions. If anything, the inference of discrimination is stronger if the employer offers a false explanation.[8] Accordingly, as the court below held, Pet. App. A10, there is no logical justification for placing an employer that fabricates a nondiscriminatory explanation in a better position

[8] See, *e.g.*, *MacDissi* v. *Valmont Industries, Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988) ("As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred."); *Brooks* v. *Monroe Systems for Business, Inc.*, 873 F.2d 202, 204 (8th Cir.), cert. denied, 493 U.S. 853 (1989).

than an employer that remains silent in the face of a prima facie case of discrimination.[9]

B. The *McDonnell Douglas* Order Of Proof Properly Requires The Employer To Frame The Factual Issues For Decision By Identifying The Nondiscriminatory Explanations That The Plaintiff Must Refute

For the reasons stated above, the court of appeals correctly held that once respondent discredited all of the nondiscriminatory reasons advanced by petitioners, he had satisfied his ultimate burden of persuasion under this Court's decisions and was entitled to judgment as a matter of law. Pet. App. A10-A11. Petitioners argue (Pet. Br. 21), however, that even if a plaintiff discredits all nondiscriminatory reasons actually advanced by the employer, he "[has] not necessarily eliminate[d] all lawful motives for the employment decision." They contend that such a showing entitles the plaintiff to no more than consideration by the trier of fact; and, on petitioners'

[9] A rule that the articulation of any facially legitimate reason for a challenged action, no matter how incredible given the facts of the case, ensures a defendant at least the possibility of a favorable decision from the trier of fact would also create perverse incentives for abuse of the judicial process by culpable defendants. Although perhaps muted in the context of bench trials, these incentives would become markedly more pronounced (and more costly) in the context of jury trials, such as those now available under recent statutory changes. See 42 U.S.C. 1981a(c), enacted by the Civil Rights Act of 1991, Pub. L. No. 102-166, §102, 105 Stat. 1073 (1991). Put bluntly, it makes no sense, as a matter of law or of judicial administration, to create incentives for defendants to lie rather than settle meritorious cases.

view, the factfinder may depart entirely from the position of either party and find that the employer acted for some nondiscriminatory reason that is "contained in the record," although not identified by the employer as the true reason for its actions.[10] *Id.*

[10] The courts of appeals are divided on the question of what a plaintiff must prove to prevail in a Title VII case where there is evidence of pretext. Petitioners' position finds support in decisions of the First, Fourth, Seventh, Tenth and Eleventh Circuits which state, at least in dicta, that proof that the employer's own explanations for its actions are incredible is insufficient by itself to compel (or in some cases even to permit) judgment for the plaintiff. See, *e.g.*, *Goldman* v. *First National Bank*, No. 92-1773 (1st Cir. Feb. 18, 1993), slip op. 8 (dictum) (reviewing prior cases); *Holder* v. *City of Raleigh*, 867 F.2d 823, 827-828 (4th Cir. 1989); *Benzies* v. *Illinois Dep't of Mental Health & Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir.) (dictum), cert. denied, 483 U.S. 1006 (1987); *EEOC* v. *Flasher Co.*, No. 91-6279 (10th Cir. Dec. 29, 1992), slip op. 17-18 (dictum); *Clark* v. *Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983). Respondent's contrary position (and that of the Eighth Circuit in this case) finds support in decisions of the Second, Third, Fifth, Sixth and District of Columbia Circuits. See, *e.g.*, *Ibrahim* v. *New York State Dep't of Health*, 904 F.2d 161, 168 (2d Cir. 1990); *Chipollini* v. *Spencer Gifts, Inc.*, 814 F.2d 893, 898-900 (3d Cir.) (en banc), cert. dismissed, 483 U.S. 1052 (1987); *Thornbrough* v. *Columbus & G. R.R.*, 760 F.2d 633, 639-640, 646-647 (5th Cir. 1985); *Tye* v. *Board of Education*, 811 F.2d 315, 320 (6th Cir.), cert. denied, 484 U.S. 924 (1987); *King* v. *Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985). There are, moreover, apparent inconsistencies among decisions within several circuits. Compare, *e.g.*, *Thornbrough*, *supra*, with *Bienkowski* v. *American Airlines, Inc.*, 851 F.2d 1503, 1508 & n.6 (5th Cir. 1988); *Tye*, *supra*, with *Miller* v. *WFLI Radio Inc.*, 687 F.2d 136, 138-139 (6th Cir. 1982); *Clark*, *supra*, with *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987). See generally Lanctot, *The Defendant*

at 17. The district court in this case adopted that approach, faulting respondent for not disproving a possible explanation for petitioners' actions—personal animosity unrelated to race—that petitioners themselves had never advanced during the course of the trial. See Pet. App. A27. Any such rule would, however, seriously undermine the fair and efficient operation of the *McDonnell Douglas* framework of proof.

As this Court has explained, that framework should be viewed and applied as "a sensible, orderly way to evaluate the evidence" in an employment discrimination case. *Furnco*, 438 U.S. at 577. In that light, the probative value of proof that the reasons the employer advances are unworthy of credence arises largely because

> we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Ibid. As a theoretical matter, however, a given employment decision *might* conceivably have been justified by any number of reasons that would be

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Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 Hast. L.J. 57, 71-91 (1991) (collecting cases).

"legitimate" in the sense that they are not prohibited by Title VII. But it would not be sensible or orderly, or an efficient use of a trial court's or the parties' resources, to force the plaintiff to attempt to negate all possible nondiscriminatory reasons for the employer's actions—including reasons that were never even proffered by the employer itself.[11] After all, the employer is in the best position to know on what basis it acted. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. at 359 n.45. If the employer does not articulate a given reason, it is at least more likely than not that that reason did not in fact motivate the employer's action.

The Court has made clear that in a Title VII case, "the allocation of burdens * * * is intended pro-

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[11] As the Tenth Circuit said in *EEOC* v. *Flasher Co.*, No. 91-6279 (Dec. 29, 1992), slip op. 11, "[t]he articulation of a facially, nondiscriminatory reason * * * defines the parameters of the trial, as the plaintiff then knows the precise reason that he or she may try to show is only a pretext for an illegal discriminatory motive. By articulating the reasons for the plaintiff's termination, the defendant eliminates a myriad of possible reasons that would otherwise have to be addressed. That is, we require the defendant to identify and enunciate the reasons for the termination at the outset, because there is no limit to the potential number of reasons that could be raised at trial. Otherwise litigation of discrimination claims would be needlessly confused and delayed." We find it difficult to reconcile this sensible statement of the reasons for requiring the employer to "defin[e] the parameters of the trial" with the court's later observation that proof that the reason given by the employer is pretextual does not compel judgment for the plaintiff. Slip op. 17-18. In any event, the court in *Flasher* held that the legitimate reason advanced by the employer in that case was not pretextual. *Id.* at 18.

gressively to sharpen the inquiry into the elusive factual question of intentional discrimination," *Burdine*, 450 U.S. at 255 n.8, and "to bring the litigants and the court expeditiously and fairly to this ultimate question," *id.* at 253. In particular, the employer's articulation of alleged nondiscriminatory reasons for its actions is meant to move the inquiry to "a new level of specificity," and to "frame the factual issue with sufficient clarity" so that the parties—and the court—can move efficiently to the final stage of the litigation. At that stage, the plaintiff must carry his ultimate burden of proving discrimination, but he can do so either by direct proof of a discriminatory motivation, or by satisfying the trier of fact that the explanations proffered by the employer are pre-textual.[12] *Id.* at 255-256. Once the employer's stated reasons have been shown to be false, allowing the fact finder to determine (or speculate) that the employer acted with some other, unarticulated motivation would vitiate this sensible method for narrowing the issues to be addressed by the parties and decided by the court or jury.

It is true that by proving that an employer's stated reasons are not its actual reasons, a plaintiff does not necessarily rule out the possibility that the employer might have acted for some unarticulated, nondis-

[12] This Court's emphasis in *Burdine* on the fact that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific," 450 U.S. at 258, at least in part to satisfy "the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext," *ibid.*, clearly implies that the demonstration required from the plaintiff relates only to the reasons actually placed in issue by the defendant.

criminatory reason. But that is not the plaintiff's burden. The plaintiff need only show that it was more likely than not that the employer acted for a discriminatory reason. Once the plaintiff has established a prima facie case, he has, under *McDonnell Douglas*, produced sufficient evidence to give rise to a mandatory presumption to that effect. At that point, it is both fair and sensible to require the defendant employer, which is in the best position to ascertain and demonstrate the true reasons for its own personnel actions, to advance the decision-making process by stating the "clear and reasonably specific" explanation on which it intends to rely to justify its challenged action. See *Burdine*, 450 U.S. at 258. An employer that has not discriminated should always have a plausible explanation for its actions—*i.e.*, the true one, which a plaintiff will be unable to discredit. Irrational, mistaken, unattractive or even despicable —but nondiscriminatory—reasons will shield an employer from liability under Title VII, so long as the employer articulates them and the trier of fact finds them credible.[13] See, *e.g.*, *Pollard* v. *Rea Magnet*

[13] Some courts have suggested that an employer might dissemble about its motivations in a Title VII action because its real reasons for acting, while not prohibited by Title VII, would cause it embarrassment—or predicate legal liability—in some other context. See, *e.g.*, *Shager* v. *Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990); *Pollard* v. *Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir.), cert. denied, 484 U.S. 977 (1987). That is an unremarkable consequence of being involved in legal proceedings. The employer may of course choose to remain silent in the Title VII action, preferring to run the risk of unwarranted liability in that context rather than exposing itself to some other and presumably greater cost; but there is nothing unreasonable about forcing that choice, once the

Wire Co., 824 F.2d 557, 559 (7th Cir.) (employer's belief that plaintiff had lied about being injured was mistaken, but not pretextual), cert. denied, 484 U.S. 977 (1987); *Nix* v. *WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984) (mistaken belief that employee had broken a rule not pretextual).

By contrast, the approach taken by the district court in this case places an unreasonable burden on Title VII plaintiffs. By ruling against respondent despite finding that he had proved that all of his former employer's stated reasons for demoting and discharging him were pretextual, the district court effectively required him either to produce direct evidence of discriminatory motive, or to rebut all

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plaintiff has proved what he is required to prove in order to raise a legally mandatory inference of discrimination. See Lanctot, *supra*, 43 Hastings L.J. at 136-140. If, on the other hand, the employer produces truthful evidence of its motivations and thereby avoids liability in a Title VII action, it can hardly complain about the possible collateral consequences of having told the truth—particularly if the evidence reveals, for example, some separate illegality, or violation of a contractual obligation. See *id.* at 138. Such a predicament is little different from, for example, that of a litigant who must choose between bearing his burden of proof in a civil proceeding and invoking his Fifth Amendment privilege to remain silent because of possible collateral criminal consequences. See, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 759 (1983) ("a dilemma demanding a choice between complete silence and presenting a defense [in a civil case] has never been thought an invasion of the privilege against compelled self incrimination" (emphasis omitted)) (quoting *Williams* v. *Florida*, 399 U.S. 78, 84 (1970)). Cf. *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986) (defendant has no "right" to use false evidence).

possible unarticulated reasons for petitioners' actions. Requiring a plaintiff to prove the negative of each and every possible motivation that the employer *might* have had, rather than focusing on the reasons that the employer has advanced, would deprive the plaintiff of the "full and fair opportunity to demonstrate pretext" emphasized by this Court in *Burdine*, 450 U.S. at 256-258, and make a mockery of the "sensible, orderly way to evaluate the evidence" otherwise established by this Court's cases. *Furnco*, 438 U.S. at 577.

C. There Is No Evidence On The Record In This Case Of A Nondiscriminatory Motive That Was Not Articulated By Petitioners

Petitioners argue (Pet. Br. 16-17, 22-24) that judgment for the plaintiff is not compelled upon a showing of pretext if other reasons, not articulated by the employer, are somehow "suggested by the employer's evidence" or, alternatively, "emerge during the employee's case." Pet. Br. 16. As to the first suggestion, for the reasons discussed in Part B we find little merit in the notion that an employer should have some right to ask a court or jury to speculate about possible permissible motivations that it is unable or unwilling to articulate. This Court in *Aikens* summarized the factfinder's job as being to "decide which party's explanation of the employer's motivation it believes," 460 U.S. at 716, not to range freely over the record in search of hidden justifications advanced by neither side.[14]

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[14] Any such rule would also be substantially less manageable in the context of cases tried to a jury, rather than to a court. Under such a regime, a court would at least be required to

As to alternative explanations effectively raised by the plaintiff himself, petitioners correctly note that several lower courts, including the Eighth Circuit, have held that a trial court is not compelled to find discriminatory intent, even after a showing that an employer's stated reasons are false, in cases in which additional reasons for the adverse employment action are raised by the plaintiff and remain unrebutted at the close of trial.[15] We agree that such cases present

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articulate for itself what it believed to be the real explanation for the employer's conduct, and support its position with specific evidence from the record. Review of a jury verdict for the defendant, on the other hand, would presumably involve the question whether any rational jury could have found that *any* unspecified nondiscriminatory explanation for the employer's conduct was fairly "suggested" by the record. Aside from insulating many verdicts for the defendant from effective review, such a standard would involve trial judges and appellate courts in yet another round of speculation—this time, twice removed from the reasons and evidence actually advanced at trial by the one party in the best position to know and be able to disclose the truth: the employer.

[15] See, *e.g.*, *Galbraith* v. *Northern Telecom, Inc.*, 944 F.2d 275, 283 (6th Cir. 1991) (articulated reason clearly pretextual, but no discrimination where complaint alleged plaintiff was fired because of continued relationship with individual who shot her on company property), cert. denied, 112 S. Ct. 1497 (1992); *Visser* v. *Packer Engineering Assocs.*, 924 F.2d 655, 657 (7th Cir. 1991) (en banc) (plaintiff's evidence of pretext proved action really taken for different but nondiscriminatory reason); *Maguire* v. *Marquette University*, 814 F.2d 1213 (7th Cir. 1987) (pendent claim alleged action taken for nondiscriminatory reason); *Burger* v. *McGilley Memorial Chapels, Inc.*, 856 F.2d 1046, 1047-1048, 1051 & n.9 (8th Cir. 1988) (plaintiff's evidence of pretext included letters from firing official demonstrating different but nondiscriminatory reasons).

a significantly different issue from that presented here, because a plaintiff who asserts or proves a nondiscriminatory reason, even if unstated by the defendant, effectively undermines his own case. Moreover, under those circumstances the plaintiff cannot convincingly argue that he did not have an adequate opportunity to rebut evidence that he himself has offered. Petitioners' contention to the contrary notwithstanding, however, this is not such a case.

Petitioners state that "the district court found that [respondent] introduced through his own testimony evidence of personal animosity his immediate supervisor had toward him," and that the "court made the credibility determination that the supervisor's personal animosity was the truthful explanation for the employment decision." Pet. Br. 11; see also *id.* at 22-24. That characterization of the record and the district court's decision is inaccurate.

First, it is not entirely clear that the district court found as a fact that respondent's demotion and discharge were motivated by personal animosity. The court stated only (i) that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated," and (ii) that while respondent had demonstrated that he was treated more harshly than others, "[i]t is not clear * * * that [respondent's] race was the motivation for the harsh discipline." Pet. App. A27. Although the first statement does suggest, as the court of appeals inferred (*id.* at A10), that the district court believed that the prison administration was motivated by personal animosity toward respondent, the court

pointed to no evidence introduced by either party that would support that proposition. Thus, a fair reading of the district court's decision reveals either a wholly unsupported factual finding, or merely a holding that there was insufficient evidence of racial motivation beyond respondent's prima facie case and his further showing of pretext. As the court of appeals held, the first possibility would represent a clearly erroneous factual "assumption"; the second is legally unsound under *McDonnell Douglas*, *Burdine*, and *Aikens*. Pet. App. A10.

Second, petitioners rely entirely on evidence indicating that respondent's immediate supervisor, John Powell, demonstrated hostility toward respondent at the time of the confrontation that led to his discharge. See Pet. Br. 22-24. Even persuasive evidence that Powell was "personally" hostile to respondent would of course be far from conclusive with respect to the liability of petitioners in this case, because the final decisions regarding discipline for respondent were made by petitioners, and not by Powell.[16] See Pet. App. A17 n.6. In any event, the evidence that petitioners now cite as disclosing an unarticulated nondiscriminatory motive for their treatment of respondent establishes no such thing. There is no question that Powell was hostile to respondent; the question is *why*. The evidence cited

[16] We note that, if anything, the record would appear to refute the suggestion that Powell was "personally" hostile to respondent. When asked on cross-examination whether there had been "difficulties" between the two, Powell responded: "I can't say that there was difficulties between he and I. At no time was there any kind of personal—." The response was cut off by a further question. J.A. 46; Tr. 2-88.

by petitioners does nothing to dispel the proper inference, based on the circumstances, on respondent's establishment of his prima facie case, and on petitioners' fabricated explanation, that the real reason was respondent's race. See, *e.g.*, *Burdine*, 450 U.S. at 255 n.10.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER AND STEVE LONG,
Petitioners,

v.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as amicus curiae. The written consent of all the parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of the petitioner.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of

employment discrimination. Its membership includes over 280 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially, all of EEAC's members, and the constituents of its trade association members, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) (Title VII) As such, EEAC's members have a direct interest in the issue presented for the Court's consideration. That is, where the plaintiff has established a prima facia case of illegal discrimination and the employer has articulated a legitimate nondiscriminatory reason for that treatment, is an employee's showing that an employer's articulated reason was mere "pretext" necessarily the legal equivalent of showing that it was "pretext for discrimination" as required by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)?

The court of appeals below held that once an employer's articulated nondiscriminatory reasons were found to be deficient, the plaintiff prevails "as a matter of law." This is contrary to case law and common sense. A number of nondiscriminatory reasons might account for an employer's deficient reasons.

In the case at bar, for example, the district court found that the employer's reasons were based upon personal considerations, not discriminatory intent. Thus, allowing the holding of the court of appeals to stand will undercut the rule of law established in *McDonnell Douglas* and *Burdine*.

Because of its interest in issues involving the standard of proof in Title VII cases, EEAC has filed briefs amicus curiae in numerous cases before this Court including *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Connecticut v. Teal*, 457 U.S. 440 (1982); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), and *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

STATEMENT OF THE CASE

The plaintiff filed an individual Title VII suit against his employer, St. Mary's Honor Center, an adult correctional institution of the Missouri Department of Corrections, alleging he was demoted and then later terminated because of his race. Following a bench trial on the merits, the district court found the plaintiff had established that the defendant's reasons for demoting and terminating the plaintiff were pretextual. The district court stated, however, that the plaintiff had failed to establish that the defendant's reasons were a pretext for discrimination. Although the district court agreed there were questions regarding the employer's stated reasons, the district

court did not believe the employer's reasons were a pretext for racial discrimination.

The district court concluded that racial discrimination did not play a role in the plaintiff's firing for a number of reasons. First, the evidence showed that the new management concluded the institution was poorly run. They gave existing supervisors a probationary period to improve conditions, but the supervisors failed to make the anticipated improvements. As a result, some employees were fired. Because more supervisors were black, more blacks than whites were fired during the applicable time period. This did not alarm the district court because the court noted drastic measures were needed to improve the facility. The court further stated that thirteen additional blacks were hired in the time period in question, keeping the total number of blacks at the facility constant. Finally, the record showed that the disciplinary board that fired the plaintiff was comprised of two whites and two blacks. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991). Because there was no showing of "pretext for discrimination," the district court ordered judgment for the defendant.

The U.S. Court of Appeals for the Eighth Circuit reversed the district court, holding instead that the plaintiff satisfied his burden of proof in accordance with the standards set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) by showing that the defendant's nondiscriminatory reason proffered for the demotion and subsequent termination were merely pretextual. The court below did not require the plaintiff to demonstrate that the pretextual reasons were based on racial discrimination. Instead, the court of appeals made a blanket statement: once an employer's

reasons are discredited, the plaintiff's inquiry goes no further. *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492-493 (8th Cir. 1992). The court below held,

> [i]f the plaintiff has proven by a preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action—then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required.

970 F.2d at 493. The court thus established an inflexible rule that "[o]nce plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law." *Id.* at 492.

SUMMARY OF ARGUMENT

The court below ruled that a plaintiff in a disparate treatment suit prevails "as a matter of law" once an employer's articulated reasons for its actions are rebutted. This holding is erroneous because it violates the principles set forth in *McDonnell Douglas* and *Burdine* which require the plaintiff to demonstrate that the defendant's articulated nondiscriminatory reasons actually were based upon impermissible factors, such as the plaintiff's race or sex. The U.S. Court of Appeals for the Eighth Circuit is also in conflict with other circuits. *See also Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992) (A showing of pretext must be based on discriminatory intent); *Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities*, 810 F.2d 146 (7th Cir. 1987), *cert. denied*, 483 U.S. 1006 (1987) (A finding of pretext does not necessarily mean the employer acted

with discriminatory intent). In *EEOC v. Flasher Co.*, 60 Fair Empl. Prac. Cas. (BNA) 814, 820 (10th Cir. 1992), the correct rule of law recently has been clarified:

> Merely finding that people have been treated differently stops short of the crucial question: why people have been treated differently. While comparing specific disciplinary actions can give rise to an inference of discrimination, it need not do so. Proffered reasons may be a pretext for a host of motives, both proper and improper, that do not give rise to liability under Title VII.

Thus, this Court and three other circuits have made it clear that an employer's articulated nondiscriminatory reason may be classified as pretextual only if it is a "pretext for [illegal] discrimination," not if it is merely pretext for some other nondiscriminatory intent. *Burdine*, 450 U.S. at 253. Moreover, the standard adopted by the Eighth Circuit undercuts the purpose of the *McDonnell Douglas* test by not requiring the plaintiff to show that the defendant's articulated nondiscriminatory reasons were "a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805.

ARGUMENT

I. TO ESTABLISH ILLEGAL DISCRIMINATION UNDER TITLE VII, THE PLAINTIFF MUST PROVE THAT THE EMPLOYER'S ARTICULATED NONDISCRIMINATORY REASONS FOR ITS ACTIONS WERE A "PRETEXT FOR DISCRIMINATION" AS REQUIRED BY *BURDINE*; CONTRARY TO THE EIGHTH CIRCUIT'S DECISION, MERELY REBUTTING THE EMPLOYER'S ARTICULATED REASONS DOES NOT ESTABLISH ILLEGAL DISCRIMINATION AS A MATTER OF LAW.

A. The Court Below Failed To Apply the Correct Rule of Law by Not Requiring the Plaintiff To Demonstrate That the Employer's Articulated Reasons Were a Pretext for Impermissible Discriminatory Factors Such as Race or Sex.

1. *The plaintiff must establish a prima facie case of illegal discrimination.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2. In a series of decisions beginning with *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and continuing through *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court has developed a series of requirements a plaintiff must fulfill in order to prove illegal disparate treatment. Recognizing that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental process," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), so that direct, "smoking gun" evidence is often unavailable, this Court has instead developed "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of

discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

McDonnell Douglas set forth "the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." *Burdine*, 450 U.S. at 252. In the first prong of the analytical framework, the plaintiff establishes a prima facie case of racial discrimination. The plaintiff must prove by a preponderance of the evidence:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802.

At this stage of the proof, the plaintiff's burden is not difficult: "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. The Court of Appeals for the Tenth Circuit agreed, "The presumption arising under the first prong of *McDonnell Douglas* is a relatively weak inference that corresponds to the small amount of proof necessary to create it." *Flasher*, 60 Fair Empl. Prac. Cas. at 818 (citation omitted).

2. The next step, the defendant's burden of going forward: merely articulating, but not proving, a legitimate nondiscriminatory reason for the disparate treatment.

Once the plaintiff has established its prima facie case, the burden of going forward is then on the defendant to "articulate a legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas*, 411 U.S. at 802. The employer need only "articulate" a nondiscriminatory reason.

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons (citation omitted). It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against plaintiff.

Burdine, 450 U.S. at 254-255.

The defendant is required to state the reasons for its actions because "[t]here is no limit to the potential number of reasons that could be raised at trial. Otherwise, litigation of discrimination claims would be needlessly confused and delayed." *Flasher*, 60 Fair Empl. Prac. Cas. at 818. The defendant's burden of articulation also is light. The employer is only required to state its reason, not prove that it used the stated reason or anything about the reason. As the *Flasher* court explained:

> The defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does

not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.

Id. at 817 (citations and footnote omitted).

3. ***After the defendant has articulated a legitimate nondiscriminatory reason, the plaintiff must then prove, by a preponderance of the evidence, that the defendant's reasons were pretextual and the actual reason for the disparate treatment was illegal discrimination.***

If the defendant articulates a nondiscriminatory reason for its actions, the inference of discrimination raised by the prima facie case "vanishes" (*Flasher*, 60 Fair Empl. Prac. Cas. at 821) and "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255. At that next level of inquiry, the court must determine that the plaintiff "was the victim of intentional discrimination." *Flasher*, 60 Fair Empl. Prac. Cas. at 821, n.11.

> [T]he plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext *for discrimination.*

Burdine, 450 U.S. at 253 (emphasis added). Also,

> [The plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup *for a racially discriminatory decision.*

McDonnell Douglas, 411 U.S. at 805 (emphasis added).

Thus, the plaintiff must be careful to demonstrate that the employer's articulated reason was a pretext *for discrimination*, and not merely pretext in the generic sense.

> It is easy to confuse 'pretext for discrimination' with 'pretext' in the more common sense (meaning any fabricated explanation for an action), and to confound even this watery use of 'pretext' with a mistake or irregularity.

Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 559 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987) (*see Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992)).

Thus, the rule of law is clear: the plaintiff must show that the defendant's articulated nondiscriminatory reasons were a pretext for discrimination of the specific type prohibited by the statute.

B. To Prevail in a Disparate Treatment Case, a Plaintiff Must Prove "Pretext for Discrimination," Not Merely "Pretext" in the Generic Sense.

An issue arises, therefore, when a plaintiff demonstrates that the articulated reason is pretext, but does not prove "as a matter of law" that the pretext is a sham for covering up discrimination based on a protected class status. It is clear that a plaintiff must do more than merely demonstrate that there was pretext, for that pretext may have arisen out of many sources. In short, a plaintiff must convince the trier of fact that there was "pretext for discrimination." *Burdine*, 450 U.S. at 253.

The purpose of the *McDonnell Douglas* test is to facilitate the central inquiry: did discrimination

occur? *Furnco*, 438 U.S. at 577. Contrary to the inflexible legalistic approach of the court below, "[t]he method suggested in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic." *Id.* Accordingly, the flexibility of the *McDonnell Douglas* proof scheme does not relieve the plaintiff from the ultimate burden of demonstrating some connection to discriminatory intent. The prima facie case raises the inference of discrimination, the defendant's legitimate, nondiscriminatory explanation for the difference in treatment makes the presumption from the prima facie case drop out, and the plaintiff must demonstrate that the defendant's reasons were a "pretext for discrimination." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983).

Thus, while discriminatory intent may be manifest in the course of proving pretext, if the showing of pretext is not based on sufficient evidentiary proof of discriminatory intent, the burden on the plaintiff to demonstrate such intent to a preponderance of the evidence was not met.

1. *A plaintiff's showing of differences in treatment of members of a protected class does not necessarily establish intentional discrimination.*

The court below was incorrect in holding that the plaintiff's showing that similarly situated individuals were treated differently required a ruling for the plaintiff "as a matter of law." A contrary, but correct approach is set out in *EEOC v. Flasher Co.*, 60 Fair Empl. Prac. Cas. 814 (10th Cir. 1992). The plaintiff brought a Title VII claim based on national origin. The plaintiff, an Hispanic employee, established that the defendant had disciplined him differently from the other non-minority employees at the company. The plaintiff did not, however, establish that this treatment was related to racial discrimination. The court stated: "[w]e hold that a mere finding of disparate treatment, without a finding that the disparate treatment was the result of intentional discrimination based upon protected class characteristics, does not prove a claim under Title VII." *Id.* at 815.

The *Flasher* decision explains that an employer's reason for treating an employee differently, though not based on a rational business practice, does not necessarily compel the conclusion that the disparate treatment was discriminatorily motivated.

> It is error to assume . . . that differential treatment between a minority employee and a non-minority employee that is not explained by the employer in terms of a rational, predetermined business policy *must* be based on illegal discrimination because of an employee's protected class characteristics. Such an assumption is neither correct under the law nor is it an accurate reflection of reality.
>
> * * * *
>
> Title VII does *not* make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal. It prohibits only intentional discrimination *based upon* an employee's protected class characteristics.

Id. at 819 (citations omitted).

All of this Court's prior decisions require that the trier of fact must ultimately believe that the differences in treatment were related to discrimination and not some other reason not prohibited by the stat-

ute. The trier of fact, for instance, may also believe that human nature caused the employer to implement irrational employment practices which led to the disparate treatment, rather than illegal discrimination. No business is immune from disparate treatment that is based on reasons not prohibited by law: "Differences in treatment are inevitable, and even irrational or accidental differences of treatment occur in most business organizations of any size." *Id.* The Tenth Circuit further explained:

> Human relationships are inherently complex. Large employers must deal with a multitude of employment decisions, involving different employees, different supervisors, different time periods and an incredible array of facts that will inevitably differ even among seemingly similar situations. The law does not require, nor could it ever realistically require, employers to treat all of their employees all of the time in all matters with absolute, antiseptic, hindsight equality.

Id.

The *Flasher* court also identified other situations where an employer treated its employees differently, but that treatment was not prohibited under Title VII:

> Sometimes apparently irrational differences in treatment between different employees that cannot be explained on the basis of clearly articulated company policies may be explained by the fact that the discipline was administered by different supervisors, *Jones v. Gerwens*, 874 F.2d 1534, 1541 (11th Cir. 1989), or that the events occurred at different times when the company's attitudes toward certain infractions were different, *Grohs v. Gold Bond. Bldg. Products*, 859 F.2d 1283, 1287 (7th Cir. 1988), *cert. denied*, 490 U.S. 1036 (1989), or that the individualized circumstances surrounding the infractions offered some mitigation for the infractions less severely punished, *Brazer v. St. Regis Paper Co.*, 498 F. Supp. 1092, 1098 (M.D. Fla., 1980). . . .

60 Fair Empl. Prac. Cas. at 820 (footnotes omitted).

In the above mentioned cases, the plaintiff did not establish that the employer's articulated nondiscriminatory reason was pretextual. The plaintiff merely established that the employer was treating employees differently, not that they were treated differently on the basis of illegal intent.

2. A showing of pretext alone does not satisfy the plaintiff's burden of proving "pretext for discrimination" by a preponderance of the evidence.

In the next scenario—the situation in the instant case—plaintiff may have demonstrated that the employer's articulated reason was not the true reason for the disparate treatment. The plaintiff, however, did not prove by a preponderance of the evidence (either by direct evidence or inference) that the employer's pretextual explanation for the disparate treatment was given to cover up an illegal intent to discriminate. In those instances, the court should not find "pretext for discrimination." *Burdine*, 450 U.S. at 253.

In *Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities*, 810 F.2d 146 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987), the plaintiff did not prevail even after a finding of pretext because the employer's underlying action was not proven by a preponderance of the evidence to be based on illegal intent to discriminate.

> [T]he plaintiff must show that intentional discrimination caused the employer to take some unfavorable action [citations omitted]. . . . To have any hope of showing this, the plaintiff must puncture a neutral explanation the employer offers for its conduct. Benzies argues that if the plaintiff does so—in the argot, shows that the explanation is a "pretext"—then the district court must infer that the employer acted with discriminatory intent. Not so. A demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, *but it does not compel such an inference as a matter of law.*

Id. at 148 (emphasis added).

Similarly, in *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992), the plaintiff also established that the defendant's articulated nondiscriminatory reasons for her termination were pretextual. The court, however, ruled that the plaintiff failed to prove a pretext for discrimination.

> It is apparent to us . . . that Galbraith's [the plaintiff] asserted violation of the company's medical leave policy was a pretext for the company's true motives in discharging Galbraith.
>
> * * * *
>
> The 'legitimate' reason proffered by Northern Telecom is clearly a pretext, and although it is 'unworthy of belief,' we do not believe that it is a pretext for racial discrimination.

Galbraith, 944 F.2d at 282.

In *Galbraith* the court's rationale provides ample reasoning to reject the holding of the Eighth Circuit below:

> In this case, the magistrate apparently believed that once Galbraith had demonstrated that abuse of the medical leave system was not the reason for her dismissal, *no further inquiry was required* and Galbraith was entitled to judgment, even if there was little other evidence of racial motivation. *This view misapprehends* the nature of the *McDonnell Douglas* doctrine. . . . In the third phase of the *McDonnell Douglas* framework, she must persuade the trier of fact that the proffered reason was pretextual, but this burden is simply a way of bearing her ultimate burden of showing that she has been the victim of intentional discrimination.

Galbraith, 944 F.2d at 282-283 (emphasis added).

Thus, it is entirely possible that a plaintiff can demonstrate "pretext" but fail to demonstrate "a pretext for discrimination." As the court stated in *Flasher*,

> [D]ifferences in treatment are inevitable . . . Although differential treatment not premised on rational business policy may in some instances support an inference of illegal discriminatory intent, such a conclusion is *not compelled as a matter of law.*

60 Fair Empl. Prac. Cas. at 819 (emphasis added).

3. *"Pretext for discrimination" was not proven by a preponderance of the evidence in the instant case.*

In the instant case, the plaintiff established that the defendant's articulated reasons for the disparate treatment were pretextual. The district court, however, found that the reasons were not a pretext for discrimination.

The district court below found that the plaintiff had not proven that the employer's conduct "was racially rather than personally motivated." *Hicks*, 756 F. Supp. at 1252. Indeed, the district court found that plaintiff's black subordinates who actually committed the violations that lead to plaintiff's discharge "were not disciplined in any way." *Id.*

Further, the plaintiff did not present any statistical evidence showing "a general pattern of discrimination against blacks." *McDonnell Douglas v. Green*, 411 U.S. at 805. To the contrary, the district court held that although about twelve blacks and one white employee were terminated during the relevant time period, the employer *hired* thirteen blacks during the same period. 756 F. Supp. at 1242. Also, "the number of black employees at St. Mary's remained constant during the period in question." *Id.* Further, "the disciplinary review board which recommended this discipline was composed of two blacks and two whites." *Id.* Based on this evidence, the district court concluded that the plaintiff had not, "proven by direct evidence or inference that his unfair treatment was motivated by his race." *Id.* These findings were not considered or rejected by the Eighth Circuit which apparently felt they were irrelevant because the employer's stated reasons were not credited.

This evidence, indeed, would not be relevant under the applicable law set out by the Eighth Circuit below:

> In this circuit, if the plaintiff has met his or her burden of proof at the pretext stage—that is, if the plaintiff has proven by a preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action—then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required.

Hicks, 970 F.2d at 493.

Contrary to the Eighth Circuit's faulty rationale, the plaintiff must be required to prove that the pretextual reason was a coverup for *illegal, intentional* discrimination. As the evidence shows, the plaintiff failed "to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. Instead, competent evidence considered by the district court show the contrary—that permissible reasons explained the employer's actions.

Thus, both *McDonnell Douglas* and *Burdine* require the plaintiff to show the court that the pretextual reason was based on an intent to illegally discriminate. In the case at bar, the court below failed to require the plaintiff to show that the pretextual reason was motivated by illegal discrimination.

CONCLUSION

The decision of the court below is inconsistent with the standards for pretext established by this Court. The courts of appeals for three circuits have upheld this Court's rule of law regarding pretext. Moreover, to permit a plaintiff to establish pretext without requiring the plaintiff to relate that to illegal discrimination, is not in keeping with its purpose of establishing an inference of discrimination. Finally, such a standard undercuts the purpose of the third step of the *McDonnell Douglas* test requiring a showing that the defendant's articulated nondiscriminatory reasons

were "a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805.

For the reasons stated, EEAC respectfully submits that the decision of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER and STEVEN LONG,
Petitioners,

v.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of the petitioners, St. Mary's Honor Center and Steven Long.[1] The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community. An important

[1] Both petitioners and respondent have consented to the Chamber's filing of this brief. The parties' consent letters are being filed simultaneously with this brief.

function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. *E.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), *International Union v. Johnson Controls*, —— U.S. ——, 111 S.Ct. 1196 (1991), and *Hazen Paper v. Biggins*, No. 91-1600 (U.S. *amicus* brief filed Aug. 6, 1992).

As potential respondents to charges of employment discrimination, the Chamber's members have a vital interest in how disparate treatment cases, like the case below, are proved. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1985), this Court articulated a three-step process for proving cases of intentional employment discrimination. That model prescribes the following system of proof: (1) the plaintiff must establish a *prima facie* case of disparate treatment, creating a presumption of discrimination; (2) the defendant can then rebut the presumption by articulating legitimate, nondiscriminatory reasons for the employment action; (3) the plaintiff then has the burden of demonstrating that the employer's articulated reasons are a "pretext for discrimination." The proper construction of the third—pretext for discrimination—step of the *McDonnell Douglas/Burdine* model is at issue here.

It is axiomatic that plaintiffs bear the burden of proof in employment discrimination cases. The Eighth Circuit's interpretation of the third step of this Court's model of proof essentially eliminates the plaintiff's ultimate burden of proving a case of intentional discrimination. By allowing a plaintiff merely to discredit the legitimate, non-discriminatory reasons given by the employer for its

employment action, without also showing that the employer's "real reasons" were discriminatory, the Eighth Circuit has severely short-circuited this Court's careful allocation of proof in employment discrimination cases.

Pretext for discrimination means more than merely discrediting the employer's articulated reasons for undertaking a specific employment action. Unless corrected, the Eighth Circuit's interpretation will subject Chamber members to *per se* liability for employment discrimination, without a showing of discriminatory intent, any time reasons for employment actions are refuted. Thus, Chamber members have a fundamental interest in ensuring that the decision of the appellate court is reversed.

STATEMENT OF THE CASE

St. Mary's Honor Center is a correctional facility operated by the Missouri Department of Corrections. Melvin Hicks, an African-American, was employed by St. Mary's as a correctional officer. On several occasions, Hicks was disciplined, demoted, and eventually discharged by the supervisors at St. Mary's for violating a series of prison rules. Hicks brought a Title VII action against St. Mary's and a 42 U.S.C. § 1983 action against St. Mary's superintendent, Steven Long. Hicks alleged that his demotion and discharge were motivated by racial discrimination.

After a trial on the merits, the U.S. District Court for the District of Missouri found in favor of St. Mary's. The court analyzed Hicks' disparate treatment allegations under the proof model set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1985). Using this model, the District Court determined that Hicks had established a *prima facie* case of racial discrimination, and that St. Mary's had articulated two legitimate, non-discriminatory reasons for Hicks' demotion and discharge. The court then held that Hicks had

established that the reasons for his discharge were a pretext for discrimination. The court, however, concluded that Hicks failed to meet his "ultimate burden" of proving that his demotion and discharge were racially motivated. Hicks failed, according to the court, because he had not established that his discharge was "racially" rather than "personally" motivated.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed the District Court's decision. The appellate court's ruling focused on the nature of evidence needed to establish pretext under the *McDonnell Douglas/Burdine* model. The court determined that once a plaintiff discredits an employer's alleged legitimate, nondiscriminatory reasons for his discharge, the plaintiff has satisfied his ultimate burden of establishing race discrimination. In doing so, the Eighth Circuit rejected the argument that, in addition to discrediting the employer's reasons for the discharge, the plaintiff must also offer some evidence that the discharge was *actually motivated by race*. St. Mary's then filed a petition for writ of *certiorari* with this Court.

ARGUMENT

INTRODUCTION

This Court is faced with a conflict concerning the order and allocation of proof in private, non-class actions alleging intentional employment discrimination. In the present case, the Court must clarify the definition of "pretext for discrimination" under the three-part model for disparate treatment cases articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1985).[2] The Eighth Circuit erred in holding that

[2] Plaintiffs may use either direct or indirect evidence to establish a case of intentional discrimination. Since direct proof of discrimination is often difficult to find, most plaintiffs rely on indirect evidence to prove their case. In these cases, the courts use the burden of proof scheme established in *McDonnell Douglas/Burdine* to determine whether discrimination can be *inferred in the absence of direct evidence of discrimination.*

a plaintiff establishes "pretext" merely by proving that the employer's proffered explanations for discharge are untrue. Instead, this Court should recognize that a plaintiff—who retains the burden of proof at all times—must also produce some evidence of intentional discrimination in order to prevail in a disparate treatment action. Any other rule, the Chamber submits, would improperly shift the burden of proof to employers and would involve the federal courts in second-guessing the business judgment of employers.

I. THE EIGHTH CIRCUIT'S DECISION REPRESENTS A FUNDAMENTAL DEPARTURE FROM THE *McDONNELL DOUGLAS/BURDINE* ANALYSIS

In *McDonnell Douglas*, this Court set forth a three-step proof scheme for disparate treatment cases.[3] Under this scheme, the plaintiff in a Title VII action must carry the initial burden under the statute of establishing a *prima facie* case of discrimination.[4] If the plaintiff suc-

[3] There are two principal theories of discrimination: disparate treatment and disparate impact. Disparate treatment theory involves cases of differential treatment (intentional discrimination) of individuals based on race, color, sex, religion, national origin, or handicap. On the other hand, disparate impact theory focuses upon the alleged discriminatory effects of an otherwise neutral employment policy on a protected group of individuals. The present case involves an analysis of one aspect of disparate treatment theory. B. Schlei and P. Grossman, *Employment Discrimination Law* 1286-87 (1983).

[4] Under the *McDonnell Douglas* proof scheme, a *prima facie* case is established when the plaintiff shows the following: (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to

cessfully establishes a *prima facie* case, the burden then shifts to the employer to "articulate some legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas* at 802. Once the employer articulates non-discriminatory reasons for the employment action, the plaintiff must show that the employer's stated reason for rejecting the plaintiff are a "pretext for discrimination." *Id.*

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1985), the Court refined the second-step of the *McDonnell Douglas* model. The Court determined that, once the *prima facie* case is established, the employer's burden is merely one of "production"—to state valid reasons for the employment action that dispel the notion of discrimination. The employer "need not persuade the court it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine* at 256. Once the employer carries this burden of production, "the presumption raised by the *prima facie* case is rebutted." *Id.*

More importantly, for purposes of this case, *Burdine* explicitly placed the burden of persuasion on plaintiffs in disparate treatment cases. The *Burdine* Court declared that the plaintiff must bear the *ultimate burden* of proving that the employer intentionally discriminated against the plaintiff. According to the Court, "the plaintiff retains the burden of persuasion . . . This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* To meet this burden, however, the Court determined that a plaintiff "may succeed either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the

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seek applicants from persons of complainant's qualifications. 411 U.S. at 802.

employer's proffered explanation is unworthy of credence." *Id.*

Unfortunately, there is an inherent conflict between the Court's mandate in *Burdine* that plaintiffs maintain the ultimate burden of persuasion in disparate treatment cases, and the way in which the Court determined plaintiffs are to meet that burden. Plaintiffs cannot satisfy their ultimate burden simply by offering indirect evidence that demonstrates that the employer's articulated reasons for the discharge are untrue. Demonstrating pretext for discrimination means more than discrediting the reasons for taking a certain employment action. Other legitimate, albeit, unarticulated reasons may have influenced an employer's adverse employment action. In addition, the employer may have simply exercised poor business judgment in taking action. Plaintiffs must offer some evidence of discriminatory animus to satisfy their ultimate burden. To hold otherwise, would allow plaintiffs to prevail without offering evidence that reaches the core issue in question—whether the "real reasons" for the discharge were a *pretext for discrimination.*

The appellate courts have adhered to *Burdine's* mandate by placing the ultimate burden on the plaintiff to show that an employer's articulated reasons for the discharge are a pretext for discrimination. In *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1991), the court determined that "[i]n the final round of shifting burdens, it is up to the plaintiff, unassisted by the original presumption, to show that the employer's stated reason was but a pretext for age." To do this, the court held, a plaintiff must "do more than simply refute or cast doubt on the company's rationale for the adverse action. The plaintiff must also show a discriminatory animus based on age." 896 F.2d at 9. The First Circuit properly granted the employer's motion for summary judgment on the grounds that while the employer's reasons for the employment action were a sham, they were not a sham for age discrimination.

Similarly, in *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990), the court rejected an employee's allegations of race discrimination for failing to establish that his employer used "assaultive conduct" as a pretext for discrimination. According to the court, the plaintiff "cannot prove pretext solely by contesting the objective veracity" of the employer's reasons. 901 F.2d at 191. *See also, Menzel v. Western Auto Supply Company*, 848 F.2d 327 (1st Cir. 1988) (holding that plaintiffs must "disprove" the defendant's reasons by offering some evidence of discriminatory intent); *Villanueva v. Wellesley College*, 930 F.2d 124 (1st Cir. 1991), *cert. denied* —— U.S. ——, 112 S.Ct. 181 (1991) ("the evidence *as a whole*, whether direct or indirect, must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by [discriminatory] animus." (emphasis in original)); *Spencer v. General Electric Co.*, 894 F.2d 651 (4th Cir. 1990) ("If the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant's proffered nondiscriminatory reasons are pretextual and that the employment decision was based on a sexually-discriminatory criterion."); and *Benzies v. Illinois Dep't of Mental Health & Developmental Disabilities*, 810 F.2d 146 (7th Cir. 1987), *cert. denied* 483 U.S. 1006 (1987) ("the plaintiff has the ultimate burden of persuading the court that the reasons advanced . . . are a pretext and that a substantial or motivating factor in the defendant's decision was discrimination and but for that discrimination, the plaintiff would have been appointed").

Based on the language in these cases, and from this Court's decision in *Burdine*, the Eighth Circuit's interpretation of how to demonstrate "pretext for discrimination" is obviously incorrect. The lower court never reached the critical question of whether the employer evidenced *discriminatory* animus in discharging the plaintiff. Instead, the court held the employer *per se* liable for race

discrimination once the plaintiff discredited the employer's proffered reasons for the discharge. Thus, the Eighth Circuit's decision shifted the ultimate burden of persuasion to employers to prove that there was no intentional discrimination. This result clearly conflicts with this Court's decision in *Burdine* and must be overruled.

II. UNLESS THE LOWER COURT'S DECISION IS OVERTURNED, ALL ERRORS IN MANAGERIAL DISCRETION WILL BECOME ACTIONABLE UNDER THE FEDERAL ANTI-DISCRIMINATION LAWS

Employers are generally free to discharge, promote, or demote individuals for any reason, fair or unfair, so long as the decision is not a mask for discrimination.[5] The federal anti-discrimination laws were not designed to provide a forum for disgruntled employees to voice their objections over legitimate employment practices. Nor did these laws intend the federal court system to become a "super-personnel board" which bears the burden of second-guessing whether an employer's decisions were "just" or "proper." Yet, the Eighth Circuit's decision leads to this result because it allows plaintiffs to ultimately prevail in discrimination actions without establishing a nexus between the discharge and conduct prohibited by Title VII.[6]

Employers make both good and bad personnel decisions. Some decisions are based on objective factors, like test scores or seniority privileges, that are easy to quantify.

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[5] Of course, employers do not have unlimited discretion in hiring and firing employees. Various state laws, such as those concerning wrongful discharge, protect employees from unjust employment actions.

[6] The *McDonnell Douglas/Burdine* proof model does not exclusively apply to cases involving racial discrimination. The proof scheme also applies to cases brought under the Age Discrimination in Employment Act, and 42 U.S.C. §§ 1981 and 1983.

Other decisions are based on subjective factors involving the exercise of "managerial discretion." These decisions may involve determinations that an employee "is not a team-player," or "does not have leadership ability." In some instances, the employer may simply favor one employee over another. While these employment practices may be unfair, or even wrong, they are not necessarily discriminatory. Not all so-called "errors in managerial discretion" involve conduct prohibited by Title VII. Yet unless plaintiffs are required to establish a nexus between employer action and prohibited conduct, all "bad business decisions" will become actionable under the federal anti-discrimination laws.

The case law is replete with examples of subjective business decisions that the anti-discrimination laws simply do not address. In *Keyes v. Secretary of the Navy*, 853 F.2d 1016 (1st Cir. 1988), the First Circuit specifically stated:

> Title VII does not presume to obliterate all manner of inequity, or to stanch, once and for all, what a Scottish poet, two centuries ago termed '[m]an's inhumanity to man.' What counts for purposes of a suit such as this is whether or not some specially protected quality—say race, or gender—has been implicated. 853 F.2d at 1026.

There, the court refused to find discrimination when a black woman sued the Navy for hiring a white male for a civilian post instead of her. Even though the plaintiff introduced evidence of "garden-variety cronyism," the court held that she did not meet her ultimate burden of showing that the favoritism was a pretext for discrimination since objective test scores indicated that both individuals were qualified for the position. The court emphasized that the plaintiff bears the burden "not only to show that the defendant's proffered reasons for hiring someone else were apocryphal, but that those reasons were pretexts *aimed at masking sex or race discrimination.*" *Id.* (emphasis in original).

The court similarly noted, in *Freeman v. Package Machinery Co.*, 865 F.2d 1331 (1st Cir. 1988), that "good-faith errors in an employer's business judgment are not the stuff of ADEA transgressions." 865 F.2d at 1341. Plaintiffs must show more than the employer made a "business miscalculation" to satisfy the burden of persuasion in the case. Recognizing that employers sometimes make unwise business decisions, act with ill will, or act arbitrarily, the *Freeman* court—unlike the Eighth Circuit below—had no trouble distinguishing this type of transgression from a situation which is actionable under the federal anti-discrimination laws.

Moreover, in *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987), the court held that "[s]howing that the employer dissembled is not necessarily the same as showing 'pretext for discrimination' . . . it may mean that the employer is trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement." The employer, Rea Magnet Wire Company, fired a black employee because it honestly believed the employee had called in sick to attend a body-building contest. In fact, the employee had actually suffered an ankle injury, but had not provided the employer with a physician's note to explain his absence. The court determined that although the employer did not actually have good cause to fire the plaintiff, the employer's actions were not a pretext for discrimination. According to the court, "[A] reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination." *Id.*

In the present case, the District Court also properly recognized that an employer's subjective reasons for discharging of an employee, may not necessarily be actionable under Title VII. Here, although the plaintiff had produced evidence of a plan to terminate him, he could produce no evidence that the plan was "racially rather

than personally motivated." *Hicks v. St. Mary's Honor Center*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991). Thus, the court quite correctly found no discrimination since the plaintiff could not draw a nexus between the employer's conduct and conduct prohibited by the federal anti-discrimination laws.

The fundamental flaw in the Eighth Circuit's decision is its failure to distinguish between acts of intentional discrimination and simple errors in business judgment by an employer. Under the Eighth Circuit's analysis, plaintiffs can discredit an employer's reasons for the discharge—and ultimately prevail in a discrimination action—without establishing a connection between the discharge and conduct prohibited by Title VII. In the end, such a standard subjects each and every exercise of managerial discretion to Title VII liability.

III. THE EIGHTH CIRCUIT'S RULING VIRTUALLY ELIMINATES SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES

The Eighth Circuit's ruling thwarts the effective use of summary judgment in employment discrimination litigation. This Court has acknowledged the important and effective role summary judgment plays as a means of eliminating groundless claims and avoiding the time and expense of trial.[7] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Eighth Circuit's decision—which permits plaintiffs to go to trial without adducing any evidence of discrimination—completely eviscerates the use of the summary judgment motion.

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[7] The Civil Rights Act of 1991, which became effective on November 21, 1991, made compensatory and punitive damages, and jury trials available in cases of intentional discrimination. 42 U.S.C. § 1981. By adding these provisions, the Act significantly increased the costs associated with employment litigation.

The following example illustrates the Chamber's argument. Assume a company decides to discharge the "manager" of its accounting department. The individual in question (the plaintiff) is an Asian male. The basis for the plaintiff's discharge is poor performance. However, to avoid an unpleasant confrontation and spare the plaintiff's "feelings," the employer tells the plaintiff that he is being discharged because he is not a "team player," and he "can't get along" with the staff of his department.

The plaintiff sues the company for race discrimination under Title VII. In response, the company files a motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure. This motion asserts that there are no issues of material fact, and that the company is entitled to judgment as a matter of law. The company attaches affidavits to the motion explaining its stated reasons for discharging the plaintiff.

The plaintiff responds to the company's motion. He asserts that he was a "team player" and that his staff had never complained that he was difficult to work with. He supports his position with affidavits from his co-workers and staff. However, he offers no evidence that race motivated the discharge.

The court denies the company's motion for summary judgment on the grounds that the employer failed to show that there were no issues of material fact that entitled it to a judgment as a matter of law. The case then proceeds to trial.

This example demonstrates the practical difficulties presented by the Eighth Circuit's decision. In this illustration, the plaintiff defeated a motion for summary judgment by establishing that the employer lied about the true reasons for his discharge. This "lie" became tantamount to race discrimination without the plaintiff ever having established that race factored into the employer's decision. The plaintiff merely discredited the employer's

reasons for his discharge, and, with this, created a factual dispute for trial. The employer's "business decision" to avoid confrontation with the plaintiff at the time of discharge, in essence, was enough to establish "pretext for discrimination." This result, the Chamber argues, undercuts this Court's decisions in *Celotex*, *Anderson* and *Matsushita*, and should not be allowed to stand.

By eliminating the use of summary judgment as a just and speedy method of adjudicating claims, the Eighth Circuit's decision will undoubtedly contribute to the flood of discrimination claims in the federal court system. As of September 30, 1992, there were 10,771 private employment-related civil rights actions pending in the federal courts.[8] In 1991, there were only 8,370 such cases pending in the federal court system. *Id.* This represents an increase of 28.7% over a one-year period. Without the benefit of summary judgment motions to help reduce this backlog, the federal court system's caseload will continue to grow at incremental rates.

The Eighth Circuit's interpretation of the *McDonnell Douglas/Burdine* "pretext for discrimination" language will lead to far more trials, far higher settlement costs, and far higher defense costs. Employers will be severely hindered when defending disparate treatment cases, and will have their available options and litigation strategy restricted.

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[8] Report of the Office of the Administrative Office of the United States Courts, Table C-2A (Sept. 30, 1988 through Sept. 30, 1992).

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the decision of the Eighth Circuit be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER AND STEVEN LONG,
Petitioners,

v.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In a Title VII and 42 U.S.C. § 1983 action alleging unlawful discrimination, whether a judgment for the plaintiff-employee is compelled, as a matter of law, by a finding that the defendant-employer's legitimate, non-discriminatory reasons for taking the adverse employment action are pretextual.

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IN THE

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No. 92-602

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v.

MELVIN HICKS,
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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS*

The National Association of Manufacturers ("NAM") is a non-profit voluntary business association representing more than 12,000 companies throughout the United States. NAM is

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* Counsel for both the Petitioners and the Respondent have consented to the filing of this brief. Their consents are being filed with the Clerk concurrently with the filing of this brief.

affiliated with an additional 128,000 businesses through the National Industrial Council and the NAM Associations Council. This case, which raises the issue of the proper proof standards in discrimination litigation, is of paramount importance to NAM members, who are employer-defendant parties in cases nationwide. As a principal voice of the manufacturing community, NAM is well-suited to emphasize for the Court the impact of improper proof standards on business.

STATEMENT OF THE CASE

Respondent Melvin Hicks worked for petitioner St. Mary's Honor Center, an adult correctional institution of the Missouri Department of Corrections (Pet. App. A-14-A-15). Petitioner Steven Long was the Honor Center's Superintendent (*id.* at A-14). Petitioners demoted and eventually discharged respondent Hicks (*id.* at A-18-A-19).

Hicks brought suit, alleging that racial animus motivated his demotion and discharge (Pet. App. A-14). After a trial on the merits, the district court found that Hicks had proved a *prima facie* case of racial discrimination: Hicks is black, he met the qualifications for his job, he suffered adverse employment action in that he was demoted and then discharged, and his position remained open and was ultimately filled by a white male (*id.* at A-22-A-23). The district court further found that the petitioners had advanced a legitimate, non-discriminatory reason for the adverse employment actions: the severity and the accumulation of violations of employment policies by Hicks (*id.* at A-23). The district court then found that Hicks had proved that the petitioners' articulated reason for the adverse employment actions was pretextual because it was not the true reason (*id.* at A-23-A-26). The district court concluded, however, that Hicks had not satisfied his ultimate burden of proving that race motivated the actions (*id.* at A-29). The court thus entered judgment in favor of petitioners.

The court of appeals reversed and directed judgment for Hicks. The court concluded that, "[o]nce plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law" (Pet. App. A-10). The court reasoned that "defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race" (*id.*). The court held that the plaintiff satisfies its ultimate burden of persuasion "if the plaintiff has proven by a preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action" (*id.* at A-11).

SUMMARY OF ARGUMENT

The decision below holds that an employment discrimination plaintiff must win if he proves simply that the employer's articulated legitimate, nondiscriminatory reason is not the true reason for the adverse employment action. Stated otherwise, according to the court below, the plaintiff need not set forth any evidence of discriminatory intent to warrant judgment as a matter of law. Twenty years of this Court's jurisprudence demonstrates that the court below is plainly wrong.

Under this Court's decisions, the proof scheme of an employment discrimination case contains three stages. First, the plaintiff must establish a prima facie case, which raises a temporary presumption of discrimination. Second, the employer must articulate -- not prove -- a legitimate, nondiscriminatory reason for its action, which destroys the presumption of discrimination. And, third, the plaintiff must establish that the articulated reason is a pretext for discrimination, which merges with the plaintiff's ultimate burden of persuasion on the issue of discriminatory intent.

By compelling judgment for the plaintiff on the ground that the employer's articulated reason has merely been shown to be pretextual, the decision below flatly conflicts with these principles. First, it improperly shifts a burden of persuasion to the employer to demonstrate the absence of discriminatory intent. Second, it wrongly resurrects the rebutted presumption. And, third, it erroneously allows a plaintiff to win as a matter of law without proof of discrimination.

Indeed, where an employment discrimination plaintiff proves only that the employer's articulated reason is not the true reason for its action, judgment as a matter of law should properly be directed for the defendant-employer, not for the plaintiff-employee. The employment discrimination laws were intended only to prevent discrimination; other actions are not unlawful. Proving only that the employer's articulated reason is not the true reason for its action does not provide a proper basis for an inference that discriminatory intent played a role in the employer's action. Mere proof of pretext thus represents a failure of proof on an essential element of the case, *i.e.*, on the issue of discriminatory intent. For this reason, judgment as a matter of law should be granted to the employer.

Judgment as a matter of law in favor of the employer is also necessary in such cases to ensure compliance with the intentions of the discrimination laws. A contrary result would distort the protective laws by encouraging employers not to hire protected class members. It would also impermissibly infringe on management prerogatives. And it would improperly allow plaintiffs to prevail without proof of discrimination. Therefore, where the plaintiff proves only that the employer's articulated reason is not the true reason for its action, judgment as a matter of law should be directed for the employer.

ARGUMENT

I. THE COURT BELOW MISCONSTRUED THIS COURT'S TEACHINGS ON EMPLOYMENT DISCRIMINATION LAW IN GRANTING JUDGMENT AS A MATTER OF LAW TO THE PLAINTIFF

Twenty years ago, this Court corrected another erroneous decision of the Eighth Circuit and announced proof standards that would properly govern the resolution of employment discrimination claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the present case, the Eighth Circuit has once again misstated the proof standards governing resolution of employment discrimination claims. This mistake must be corrected.

1. Under this Court's decisions, to prove discrimination, a plaintiff must first set forth a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802. A plaintiff does so by establishing (1) that he belongs to a protected class, (2) that he was qualified for the job in question, (3) that he was rejected, and (4) that the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. *Id.* at 802. The Court has noted that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). And the Court has noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802 n.13.

The Court has made it clear that the establishment of a prima facie case raises a presumption of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

This rebuttable presumption is, however, just a presumption; it is not equivalent to producing "enough evidence to permit the trier of fact to infer the fact at issue." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254 n.7. The prima facie case is likewise not equivalent to "an ultimate finding of fact as to discriminatory refusal to hire under Title VII." *Furnco Construction Corp. v. Waters*, 438 U.S. at 576. Instead, "the two are quite different." *Id.*

The Court has further ruled that, if the plaintiff establishes a prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802. The employer's "articulation" burden does not require the employer to prove an absence of discriminatory motive; on the contrary, the Court has explicitly rejected this notion:

> there is a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive.' . . . [T]he former will suffice to meet the employee's prima facie case of discrimination.

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978). Indeed, the *Burdine* Court explicitly rejected the lower court's view that "would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 257 (emphasis in original). The Court stated that such a rule would "exceed[ ] what properly can be demanded to satisfy a burden of production." *Id.*[1]

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[1] The Court has explained the absurdity of requiring the employer to prove the absence of discriminatory motive in the context of the *McDonnell Douglas* proof scheme:

> [it] would make entirely superfluous the third step in the *Furnco-McDonnell Douglas* analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as a part of the third step.

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24-25 n.1 (1978).

Once the employer articulates a legitimate, nondiscriminatory reason, the Court has said that "the presumption raised by the prima facie case is rebutted . . . ." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 255. Stated otherwise, the employer's articulation "destroys the legally mandatory inference of discrimination arising from plaintiff's initial evidence"; the presumption "drops from the case." *Id.* at n.10. Indeed, once the defendant "has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

Finally, the Court has ruled that, after the employer has articulated a legitimate, nondiscriminatory reason for its action, the plaintiff must show that the employer's reason is "a pretext *for discrimination*." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 253 (emphasis supplied). Appropriate evidence includes treatment of similarly situated non-protected class members, prior treatment of the plaintiff, or a "general policy and practice with respect to" employment of the protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804-05. Statistics "may be helpful" in showing the "policy or practice" evidence. *Id.* at 805. But the plaintiff must "demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup *for a racially discriminatory decision*." *Id.* (emphasis supplied). "This burden now merges

with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 256.

2. The Court's consistent rulings in this context reveal fundamental errors in the decision of the court below. In effect, contrary to this Court's rulings, the court below has shifted a burden of persuasion to the employer to prove the absence of discriminatory intent; it has resurrected a rebutted presumption; and it has awarded judgment as a matter of law to a plaintiff without requiring proof of racially discriminatory intent.

First, the effect of the decision below is to shift to the employer a burden of persuasion that it was not motivated by discriminatory intent, or, stated otherwise, that it was in fact motivated by the articulated reason. *See White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984); *accord*, *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 902-03 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987) (Hunter, J., dissenting) ("by allowing Chipollini to overcome Spencer's motion for summary judgment without introducing any evidence pointing to age discrimination, the majority has effectively and impermissibly shifted the burden of persuation from Chipollini to Spencer"). Under the ruling of the court below, the defendant can no longer simply articulate a legitimate, nondiscriminatory reason; the plaintiff will then prevail if he simply undermines the articulation, whether he does so by producing evidence of discrimination or not. In order not to lose, the employer will thus be forced to bear a burden of proof that this Court has expressly ruled that the employer does not bear. *See Board of Trustees of Keene State College v. Sweeney*, 439 U.S. at 25; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254.

Second, the conclusion of the court below improperly relies on maintenance of the presumption of discrimination that arises from the prima facie case. The Eighth Circuit reasoned that "defendants were in no better position than if they had remained

silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race" (Pet. App. A-10). But this Court has clearly stated that, once the employer articulates a legitimate, nondiscriminatory reason for its actions, the presumption is destroyed. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254-55. Indeed, the Court has stated that the question whether the plaintiff established a prima facie case in the first instance is "no longer relevant" to the analysis. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. at 715. Accordingly, the Eighth Circuit has improperly resurrected an irrelevant and wholly destroyed presumption. *See, e.g., White v. Vathally*, 732 F.2d at 1043; *Benzies v. Illinois Dep't of Mental Health and Dev. Disabilities*, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987).

Finally, the decision below impermissibly grants judgment as a matter of law to a plaintiff who has not proven discriminatory intent. The court below concluded that the plaintiff satisfies his ultimate burden of persuasion by proving that the employer's articulated reasons are not the true reasons for its action (Pet. App. A-11). Disproving the articulated reason, however, plainly does not establish that racial animus was in fact the reason for the decision; it is thus contrary to the requirement that the plaintiff prove that the articulated reason is a "pretext *for discrimination*." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 253 (emphasis supplied). Indeed, under the Eighth Circuit's analysis, the existence of the prima facie case is the only affirmative evidence required to grant judgment as a matter of law to the plaintiff. But this Court has expressly noted that the prima facie case is not equivalent to proving the ultimate fact of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. at 576; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254 n.7. The Eighth Circuit's grant of judgment as a matter of law for the plaintiff is therefore plainly wrong.

II. JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED TO AN EMPLOYER WHERE THE PLAINTIFF PROVES ONLY THAT THE EMPLOYER'S ARTICULATED REASON IS UNTRUE

Indeed, not only was the court below wrong in finding that judgment was compelled for the plaintiff, it should have recognized that, where the plaintiff has merely proved that the articulated reason is false and failed also to offer evidence sufficient to give rise to an inference of discrimination, judgment is in fact compelled for the employer. Whether a triable issue of fact exists requires reference to the policies of the substantive law in issue. In the context of the employment discrimination laws, this means that consideration must be given not only to the interests of potential victims of employment discrimination, but also to the interests of society in not furthering discrimination, and, in fact, in encouraging minority entry into the workplace, in not infringing on management prerogatives, and in preventing unjust verdicts based on sympathy. Where the plaintiff has submitted only evidence of pretext (as in falsity) and none of discriminatory animus, judgment must be directed for the employer in order to vindicate these other interests that are recognized by the employment discrimination laws.

A. Whether To Grant Judgment As A Matter Of Law Necessarily Requires Reference To The Substantive Law To Be Applied

In three cases decided in 1986, the Court clarified the requirements for granting judgment as a matter of law. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Following the plain language of Rule 56(c) of the Federal Rules of Civil Procedure, the Court ruled that a party's failure to establish the existence of an element essential of that party's case and on which that party bears the burden of proof at trial "mandates the entry of summary

judgment." *Celotex Corp. v. Catrett*, 477 U.S. at 322. To survive a motion for summary judgment or directed verdict, the Court stated that a party "must establish that there is a genuine issue of material fact . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. at 585-86.[2] And, equally important, the Court found that, in evaluating whether such a genuine issue of fact exists, reference must be made to the substantive law to be applied.

For example, in *Matsushita Elec. Indus. Co. v. Zenith Radio*, an antitrust case, the Court specifically noted that the substantive law affects the analysis whether to grant summary judgment; inferences to be drawn must make sense within the context of the substantive law at issue. In *Matsushita*, the Court stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. at 588. Thus, conduct that is "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*, citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Rather, to withstand summary judgment in the antitrust context, a party "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents." *Id.*

Similarly, in *Anderson v. Liberty Lobby, Inc.*, a libel suit, the Court elaborated further on the need to analyze motions for judgment as a matter of law within the context of the applicable substantive laws. Specifically, the Court stated that, "in ruling on

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[2] While *Celotex*, *Matsushita*, and *Liberty Lobby* all involved summary judgment motions, "'th[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . .'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254

B. The Employment Discrimination Law Context Requires Judgment For The Employer Where The Plaintiff Proves Only That The Employer's Articulated Reason Is Untrue

These cases make it clear that whether a party has established a genuine issue of material fact, or whether a party has failed to establish an element essential to a claim on which that party bears the burden of proof, must be evaluated with reference to the substantive law to be applied. In the context of the employment discrimination laws, that evaluation means that judgment must be directed for the employer in cases where the plaintiff has merely submitted evidence that the employer's articulated reason is untrue.

1. The Court has made plain that the employment discrimination laws, such as Title VII, were intended "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 800. The Court, however, has also made it plain that the employment discrimination laws, such as Title VII, accommodate other important policies of concern to society.

One such policy is that the employment discrimination laws not be interpreted in a manner that fosters "'[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*.'" *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976) (emphasis in original), quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Thus, the Court recently refused to interpret Title VII in a manner that would leave employers "little choice" but to impose quotas, since "'[t]his, of course, is far from

the intent of Title VII.'" *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989), quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in judgment). *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977) (prohibition on religious discrimination, which requires reasonable accommodation of employees' religious needs, does not mean that an employer must "deprive another employee of his shift preference . . . because he did not adhere to a religion" that the complaining employee adhered to).

A second policy of concern is that the employment discrimination laws not "'diminish traditional management prerogatives.'" *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 259, quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 207 (1979). *See also Local No. 93, Internat'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 520 (1986) (in enacting Title VII of the Civil Rights Act, Congress intended "'management prerogatives . . . to be left undisturbed to the greatest extent possible'"), quoting H.R. Rep. No. 914, 88th Cong., 2d Sess., pt. 2, at 29 (1963), *reprinted in*, 1964 U.S.C.C.A.N. 2355. As the Eleventh Circuit has aptly stated:

> Title VII is not a shield against harsh treatment at the workplace. Nor does the statute require the employer to have good cause for its decisions. The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.

Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (citations omitted).

A third policy of concern is that only victims of discrimination, and not simply plaintiffs in discrimination lawsuits, should prevail in discrimination lawsuits. This is why the plaintiff bears the ultimate burden of persuasion in the *McDonnell Douglas* proof scheme. Merely being a minority and suffering an adverse

employment action is not sufficient to prove discrimination: "the prima facia case under *McDonnell Douglas* . . . [is] not, in and of [itself], the evil[] Congress sought to eradicate from the employment setting." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring).

Maintenance of these policies is of extreme importance to NAM. NAM represents more than 12,000 companies that employ 85% of the workers in manufacturing. In order to remain competitive, these companies need the flexibility to approach issues that traditional management prerogatives provide. Moreover, to help ensure that companies can focus on remaining competitive, companies should not be forced into expensive and time-consuming discrimination litigation where there is no proof of discrimination. A rule that allows plaintiffs to "roll the dice" with the jury without proof of discrimination will only encourage more unmeritorious lawsuits, unnecessarily diverting valuable personnel and capital resources from improving productivity to dealing with unwarranted litigation.

2. These well-established policies demonstrate that judgment as a matter of law should be granted to the employer where the plaintiff proves only that the employer's articulated reason is untrue; the substantive employment discrimination laws compel such a result.

First, judgment as a matter of law should be granted in favor of the employer where the plaintiff proves only that the employer's articulated reason is untrue to ensure that the discrimination laws do not foster more discrimination and do not undermine attempts to improve minority entry into the workplace; that they are not converted "into instruments of[ ] the very evil they are designed to prevent." *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1247 (D.C. Cir. 1984) (Scalia, J., dissenting). Failure to grant judgment to the employer in such circumstance may, rather than aid the development of minorities in the workplace, hinder minority entry into the workplace. The ability of the plaintiff to proceed to a jury based merely on undermining

the employer's business judgment will discourage employers from implementing programs, such as affirmative action programs, to increase voluntarily the number of members of a protected class in the workforce. *Cf.* James N. Dertouzos, Elaine Holland & Patricia Ebener, *The Legal and Economic Consequences of Wrongful Termination*, Rand Institute for Civil Justice, at 48 (1988) (suggesting that threat of wrongful termination litigation may lead companies to expand their workforce, when necessary, by using contractors, part time employees, or increased overtime). As then-Judge Scalia recognized in a case that involved no disparate treatment or, at most, disparate treatment with no relation to discrimination:

> If this case did not call for a directed verdict, it is difficult to imagine any small business hiring a minority employee which does not, in doing so, commit its economic welfare and its good name to the unpredictable speculations of some yet unnamed jury. That is a net loss, rather than gain, for the cause of equal employment opportunity - and no less important, for the cause of justice in the courts.

Carter v. Duncan-Higgins, Ltd., 727 F.2d at 1247 (Scalia, J., dissenting).

Second, judgment as a matter of law should be granted in favor of the employer where the plaintiff proves only that the employer's articulated reason is not the true reason for the employer's action in order to ensure that the employment discrimination laws do not infringe on traditional management prerogatives. The fear of unwarranted, expensive, time-consuming, and costly litigation may lead employers to terminate employees only "for cause," even though traditional management prerogatives allow an employer to terminate an employee for a good reason, for a bad reason, or for no reason at all. The Fifth Circuit has recognized this possibility:

> There must be some proof that age motivated the employer's action, otherwise the law has been converted from one

> preventing discrimination because of age to one ensuring dismissals only for 'just cause' to all people over 40.

Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1508 n.6 (5th Cir. 1988). Moreover, because an employer may become embroiled in discrimination litigation simply by having its judgment questioned, the employer may stop critically and subjectively evaluating its employees -- a practice that is beneficial and often necessary, particularly in the upper ranks, to both the employees and the employer. *See, e.g.*, Charles A. Brake, Jr., *Limiting the Right to Terminate at Will--Have the Courts Forgotten the Employer?* 35 Vand. L. Rev. 201, 229-30 (1982). This flies in the face of the intention of the discrimination laws to allow the employer to act as it wishes, as long as it does not act for a discriminatory reason.

Finally, judgment as a matter of law should be granted to the employer where the plaintiff proves only that the employer's articulated reason is not the true reason for its action in order to ensure that legally insufficient verdicts do not result. A plaintiff in an employment discrimination action bears the burden of proving that the employer acted for a discriminatory reason; no other reason is unlawful. Thus, a plaintiff "must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive: . . . discrimination." *Villanueva v. Wellesley College*, 930 F.2d 124, 127 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991), quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990).

Proving only that an employer's articulated reason is not the true reason for its action does not meet the plaintiff's burden of persuasion because the employer need not persuade the court that it was actually motivated by the articulated reason in the first place. *White v. Vathally*, 732 F.2d at 1043. Moreover, proving only that an employer's articulated reason is false offers no affirmative evidence that the true reason is discriminatory. This situation is akin to that described in *Anderson v. Liberty Lobby,*

Inc., where the Court noted that a plaintiff cannot defeat a motion for summary judgment without offering "'significant probative evidence tending to support the complaint.'" 477 U.S. at 256, quoting *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968). The Court stated:

> As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion." Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 256-57, quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984).

Disproving the articulated reason thus does not affirmatively establish discriminatory intent, an essential element of plaintiff's claim. Likewise, proof that the employer's articulated reason is untrue does not create a genuine issue of material fact:

> In order to create a dispute of material fact, a discrimination plaintiff must raise an inference of discriminatory motive underlying the pretextual explanation. Nondiscriminatory motive is immaterial to a discrimination case; therefore, the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact.

Villanueva v. Wellesley College, 930 F.2d at 128 (citation omitted).

The contention that judgment should not be directed in favor of the employer because the employer is likely lying to cover up a discriminatory intent rests on an unjustifiable inference. Without evidence of discriminatory intent, it is equally likely that other nondiscriminatory reasons motivated the employer -- reasons that the employer does not want to disclose. Those reasons might

include personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules, nepotism, unpublicized financial problems, or a desire to spare the feelings of an employee. *See, e.g., Benzies v. Illinois Dep't of Mental Health and Dev. Disabilities*, 810 F.2d at 148; *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d at 903 (Hunter, J., dissenting). Having a hidden, nondiscriminatory reason is not unlawful: "Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute. Unless the employer acted for a reason prohibited by the statute, the plaintiff loses." *Benzies v. Illinois Dep't of Mental Health and Dev. Disabilities*, 810 F.2d at 148 (citation omitted).

Alternatively, of course, the employer may simply have acted arbitrarily, *i.e.*, for no reason. But the employment discrimination statutes do not preclude arbitrary action; they prohibit only unlawful discriminatory action. Unfortunately, the *McDonnell Douglas* proof scheme forces an employer to invent a reason where it lawfully acts without reason. If the employer does not do so, the employer will lose immediately because of the inability to rebut the presumption arising from the prima facie case. Proof of a lie that does not cover up an unlawful reason should not, however, force the employer to trial.

Where the articulated reason is proved false, there are thus three possible conclusions: the employer was motivated by a different nondiscriminatory reason, the employer was motivated by no reason at all, or the employer was motivated by a discriminatory reason. Only the last possible result is unlawful, and the plaintiff – not the employer – bears the burden of persuasion on that issue. Thus, akin to *Matsushita Elec. Indus. Co. v. Zenith Radio* and *Anderson v. Liberty Lobby*, there exists an untrue explanation that is as consistent with another nondiscriminatory motive or lack of motive as with a discriminatory motive. Because the plaintiff bears the burden of persuasion, the mere existence of discrimination as a possible motive cannot justify an inference of illegality and thus cannot prevent judgment as a matter of law for the employer.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER
and STEVEN LONG,

Petitioners,

v.

MELVIN HICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In an employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983, is judgment for the employee *compelled*, as a matter of law, by a finding that the employer's stated non-discriminatory reasons for adverse employment action are not the employer's actual reasons?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-602

ST. MARY'S HONORS CENTER
and STEVEN LONG,

Petitioners,

v.

MELVIN HICKS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to ensuring that a proper balance is achieved between (on the one hand) the rights of employees not to be subjected to invidious discrimination by their employers and (on the other hand) the rights of employers not to be subjected to unwarranted government intrusion into their business affairs.

To that end, WLF has appeared before this Court as well as other state and federal courts in cases dealing with federal employment discrimination laws. – *See, e.g., Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991); *Int'l Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

The Equal Opportunity Foundation is a nonprofit educational organization founded in 1987 dedicated to establishing in America a colorblind government in a colorblind society, and, to that end, to protecting the civil rights of all Americans. It is concerned that should employment discrimination laws be construed so as to permit plaintiffs to prevail in disparate treatment cases even without demonstrating directly or indirectly that the employer acted with invidious discriminatory intent, the clear language of the Civil Rights Acts, as well as their moral and constitutional justification, will be perverted.

Amici are concerned that employment discrimination laws -- both by imposing subtle pressure on employers to resort to "quotas" and by interfering in nondiscriminatory business decisions by employers -- are imposing tremendous costs on the free enterprise system and on society as a whole. For example, a recent *Forbes* Magazine article estimated the *annual* costs to the economy of affirmative action and quota hiring at $350 billion. *See* P. Brimelow and L. Spencer, "When quotas replace merit, everybody suffers," *Forbes* (Feb. 15, 1993).

Amici believe that their experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this case. *Amici* submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk.

STATEMENT OF FACTS

In the interests of economy, *amici* hereby adopt by reference the Statement of the Case contained in Petitioners' brief.

In brief, Petitioners are St. Mary's Honor Center ("St. Mary's"), a minimum security correctional facility operated by the Missouri Department of Corrections and Human Resources; and Steven Long, who was the superintendent of St. Mary's during 1984-85. Respondent Melvin Hicks was a shift commander at St. Mary's from 1980 until his demotion and eventual discharge for alleged misconduct in 1984. Hicks, an African-American, alleges that he was demoted and discharged because of his race.

Hicks filed suit in 1988 in federal district court in Missouri alleging that, by discharging him on the basis of race, St. Mary's violated his rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Long violated his rights under the Equal Protection Clause of the Fourteenth Amendment. Petition Appendix (Pet. App.) A1-A2. After a non-jury trial in June 1990, the district judge entered judgment in favor of Petitioners. Pet. App. A14-A30.

The district court found initially that Hicks had established a *prima facie* case of race discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pet. App. A22-A23. Because Hicks had established a *prima facie* case, the district court held, the burden then shifted to Petitioners to articulate a legitimate, non-discriminatory reason for the demotion and discharge. Pet. App. A23. The district court held that Petitioners met that burden by setting forth two reasons for their conduct: the severity and the accumulation of violations of prison rules committed by Hicks. *Id.*

The district court went on to find that Hicks had demonstrated that the explanations proffered by Petitioners were not Petitioners' actual motivation. The court found

that although Hicks committed several violations of institutional rules, he "was treated much more harshly than his co-workers who committed equally severe or more severe violations." Pet. App. A26. The district court nonetheless found that Hicks had failed to carry his ultimate burden of proving "by direct evidence or inference" that race was the determining factor in his discharge decision. Pet. App. A30. The district court suggested two unarticulated reasons for Hicks's discharge: (1) nonracial personal animosity against Hicks on the part of his supervisors; and (2) a desire for "full-scale removal of employees from supervisory positions" at St. Mary's in light of its reputation as a poorly run institution.[1] Pet. App. A27-A28. Accordingly, the district court dismissed the suit.

The United States Court of Appeals for the Eighth Circuit reversed and directed that judgment be entered for Hicks. The Eighth Circuit held that when (as here) a trier of fact finds that an employment discrimination plaintiff has established a prima facie case of race discrimination and that the nondiscriminatory reason(s) articulated by the employer for its conduct are "pretextual," the plaintiff has met his burden of persuasion, and the trier of fact is *required* to enter judgment for the plaintiff. Pet. App. A10-A12.

Significantly, the Eighth Circuit did not find that the district court committed a clear error of fact in finding that invidious discrimination was not a motivating factor in the decision.

---

[1] A 1983 state investigation of St. Mary's concluded that the institution was being poorly run. Pet. App. A2. As a result, its white superintendent was discharged in early 1984; and Hicks, at the time of his April 1984 demotion, was the only pre-1984 St. Mary's supervisor still holding his job. Pet. App. A15.

SUMMARY OF ARGUMENT

The decisive issue in any disparate treatment employment discrimination case is whether the employer acted with invidious discriminatory intent in taking the disputed employment action. The Court has repeatedly emphasized that in such cases the burden of persuasion on the issue of discriminatory intent remains on the plaintiff at all times.

Yet, in directing that judgment be entered for Hicks, the court of appeals in this case in effect held that a plaintiff may prevail in such cases even without carrying his burden of demonstrating -- by either direct or circumstantial evidence -- that the defendant intentionally engaged in prohibited discrimination. The district court found that Hicks had *not* carried that burden, and the court of appeals did not hold that any of the district court's factual findings were clearly erroneous. Accordingly, the court of appeals's holding that a plaintiff *must* prevail in these circumstances improperly shifts the burden of persuasion away from the plaintiff.

The court of appeals fell into error due to its fundamental misunderstanding of the nature of a "presumption." In order to assist trial courts in addressing employment discrimination claims, the Court in *McDonnell Douglas* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), held that a plaintiff raising such claims creates a rebuttable "presumption that the employer unlawfully discriminated against" him by proving certain facts, generally referred to as a "*prima facie* case." *Burdine*, 450 U.S. at 254. To rebut that presumption, the defendant must come forward with evidence suggesting a legitimate, nondiscriminatory reason for its conduct toward the plaintiff. *Id.* If the employer does so, the *McDonnell-Burdine* presumption "drops from the case" and the factual inquiry then focuses directly on the ultimate issue of discriminatory intent. *Id.* at 255. In sum, the *McDonnell-Burdine* presumption is of no further effect or relevance

once the employer comes forward with evidence of a nondiscriminatory reason for its conduct.

The court of appeals attempted to read far more strength into the *McDonnell-Burdine* presumption than was ever intended by Congress or this Court. The court of appeals refused to allow that presumption to "drop[] from the case" once Petitioners came forward with the requisite rebuttal evidence. Rather, the court of appeals insisted that the presumption is revived once a plaintiff shows that the rebuttal evidence offered by the defendant is "pretextual." Pet. App. A10-A12. That interpretation of the presumption not only conflicts with this Court's precedents, but also flies in the face of Rule 301 of the Federal Rules of Evidence, which governs the use of presumptions in federal courts.

Rule 301 was adopted by Congress in 1975 (as part of the Federal Rules of Evidence) and incorporates the view of the effect of presumptions articulated by Harvard Professor James B. Thayer in 1898. Under Thayer's narrow view of presumptions, once a presumption has been met by admissible evidence to the contrary, it vanishes. Neither the language of Rule 301 nor its legislative history allows any other interpretation. Since civil rights litigation is to be governed by the ordinary procedural rules applicable to all other civil litigation, Rule 301 must be applied to this case. Rule 301 dictates that because Petitioners articulated nondiscriminatory explanations for their conduct toward Hicks, the *McDonnell-Burdine* presumption should play no role in this case; rather, the sole issue to be decided is simply one of intentional discrimination.

Amici do not mean to suggest that a district court finding of intentional discrimination in this case would have constituted clear error. Indeed, one could rationally draw a strong inference of intentional discrimination from the fact that the explanation given by Petitioners for their conduct turned out to be false. One who gives false explanations for one's conduct generally has something to

hide, and in employment discrimination cases that something may well be invidious discriminatory intent. But it is certainly not the case that false explanations *always* are a pretext for intentional discrimination; employers may have strong reasons for hiding their motivations even when their actions did not violate civil rights laws (*e.g.*, when an employee's termination arguably violates a collective bargaining agreement).

The Court should reverse the Eighth Circuit's decision and remand the case to that court. The Eighth Circuit should then review under a clearly erroneous standard the district court's factual finding that Hicks failed to carry his evidentiary burden on the issue of intentional discrimination. Since the burden of persuasion must remain on Hicks at all times, the Eighth Circuit should be directed to consider all evidence that Petitioners did not act with invidious discriminatory intent (*e.g.*, evidence that Hicks's discharge was based on nonracial personal animosity or a desire to clean house among St. Mary's supervisory personnel) even though Petitioners may not have openly articulated those rationales for their behavior.

ARGUMENT

I. THE COURT OF APPEALS IMPROPERLY RELIEVED HICKS OF HIS BURDEN OF PERSUASION BY INTERPRETING THE EFFECT OF THE *McDONNELL-BURDINE* PRESUMPTION TOO STRONGLY

The ultimate issue in any federal employment discrimination suit brought, as here, under a disparate treatment theory is whether the plaintiff has demonstrated that his employer acted with invidious discriminatory intent. As the Court explained in *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983):

> The "factual inquiry" in a Title VII case is "[whether] the defendant intentionally discriminated against the plaintiff." *Burdine*, [450

> U.S.] at 253. In other words, is "the employer treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

Aikens, 460 U.S. at 715.

To assist trial courts in making that ultimate determination, the Court has set forth a method (known as the "*prima facie* case" method) of ordering the presentation of evidence in a non-class action disparate treatment case brought under Title VII (or under 42 U.S.C. §§ 1981 or 1983). Thus, in *McDonnell Douglas* the Court outlined a three-part order of proof. First, a plaintiff meets his initial burden of persuasion by establishing a *prima facie* case of racial discrimination. That case is established by showing that: (1) the plaintiff belongs to a protected class; (2) he was qualified for the job he sought or hoped to retain; (3) despite his qualifications, he was rejected (or discharged); and (4) after his rejection (or discharge), the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. *McDonnell Douglas*, 411 U.S. at 802. A plaintiff that establishes a *prima facie* case is held to have created a "presumption" that the employer unlawfully discriminated against him, because (the Court has concluded) it is reasonable to infer that the acts constituting a *prima facie* case, if otherwise unexplained, "are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577.

If a plaintiff establishes a *prima facie* case, the burden then shifts to the employer to articulate a nondiscriminatory reason for its conduct. *McDonnell Douglas*, 411 U.S. at 802. The defendant is not required, however, to persuade the court that it was actually motivated by the proffered reasons; rather, the employer meets its burden of production -- and successfully rebuts

the presumption created by the *prima facie* case -- by setting forth, through the introduction of admissible evidence, the reasons for its actions. *Burdine*, 450 U.S. at 254-255.

Once the employer meets its burden of production, the *McDonnell-Burdine* presumption "drops from the case" and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255 & n.10. In other words, at that point the trial court's task is simply to determine, based on all the evidence, whether the plaintiff has met his burden of proving that his employer intentionally discriminated against him. *Aikens*, 460 U.S. at 715.

The plaintiff can attempt to meet that burden with *direct* evidence that the employer harbored an invidious discriminatory motive, or by *indirect* evidence -- such as that the reasons proffered by the employer for its actions are false. *Burdine*, 450 U.S. at 256. If the plaintiff demonstrates that the employer's proffered reasons are false, a trial court could reasonably conclude that those reasons were actually "a pretext for the sort of discrimination prohibited by [Title VII]." *McDonnell Douglas*, 411 U.S. at 804.

But nothing in this Court's decisions supports the Eighth Circuit's conclusion that a trial court is *required* to rule for the plaintiff once he establishes that the employer's proffered explanations are false. This Court has held repeatedly that to prevail in a disparate treatment employment discrimination case the plaintiff *must* demonstrate that the employer intentionally discriminated against him,[2] yet the Eighth Circuit's decision provides

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[2] This is not to say that the plaintiff must provide *direct* evidence of discrimination; the Court stressed in *Aikens* that a plaintiff also may prevail based on *indirect* evidence of discrimination. *Aikens*, 460 U.S. at 714 n.3. We note, however, that the district court in this case explicitly acknowledged that Hicks was not required to present direct evidence of racial discrimination in order to prevail (Pet. App. A29);

(continued...)

such plaintiffs with an entirely new method of prevailing in such cases: by showing that the employer has proffered false explanations for his actions. That simply is not the law. Title VII (and other federal civil rights laws) impose liability on employers for invidious discriminatory conduct, not for being less than candid with a court. Accordingly, the Eighth Circuit's holding -- that a plaintiff *must* prevail after debunking the employer's proffered reasons for its actions -- should be reversed.

Part of the confusion in this case stems from the use of the word "pretext." "Pretext" is logically, grammatically, and legally part of a prepositional phrase: a proffered motive is shown to be a "pretext for" a concealed motive. *Webster's Third New International Dictionary* 197 (1971). The Court consistently has limited its use of the word "pretext" in Title VII cases to only one type of concealed motive: a concealed motive based on invidious intentional discrimination. *See McDonnell Douglas*, 411 U.S. at 804 ("a pretext for the sort of discrimination prohibited by" Title VII); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) ("Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination"); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979); *Connecticut v. Teal*, 457 U.S. 441, 447 (1982). However, the district court in this case was using the word "pretext" in a broader sense, such that an employer's proffered reasons for its conduct are "pretextual" whenever they are false; *i.e.*, whenever the employer has *any* concealed motive for its conduct.

Because the district court was using the word "pretext" in a different sense from that normally used by this Court, it perhaps would have been wiser to use the word "false," rather than the word "pretextual," to

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[2] (...continued)
the district court simply found that Hicks's indirect evidence was insufficient to meet his evidentiary burden in this case.

describe Petitioners' proffered explanations regarding why Hicks was demoted and discharged. Nonetheless, it is clear from the district court's opinion that it did *not* find that Petitioners' proffered explanations were a pretext for racial discrimination. In the absence of such a finding, Hicks cannot prevail on his employment discrimination claims.

In sum, the burden of persuasion was on Hicks to demonstrate that Petitioners acted for racially discriminatory reasons. The district court found that Hicks failed to meet that burden. In light of that finding, the Eighth Circuit's holding that judgment must be entered for Hicks should be reversed.

II. THE COURT'S LIMITED CONSTRUCTION OF THE *McDONNELL-BURDINE* PRESUMPTION IS REQUIRED BY FRE 301

The result reached by the Eighth Circuit can be upheld only if one grants the *McDonnell-Burdine* presumption far more strength than this Court or Congress ever intended. Under the Eighth Circuit's view, the *McDonnell-Burdine* presumption is not destroyed by the employer's articulation of nondiscriminatory reasons for its actions, but rather is resuscitated by a showing that the employer's articulated reasons were not its true reasons. Pet. App. A10. That view of the *McDonnell-Burdine* presumption is at odds with the holdings of this Court that "the presumption drops from the case" once the employer has articulated nondiscriminatory reasons for its actions. *Burdine*, 450 U.S. 255 n.10.

Moreover, the limited weight accorded by the Court to the *McDonnell-Burdine* presumption is mandated by Rule 301 of the Federal Rules of Evidence.[3] The text and

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[3] Rule 301 provides:

(continued...)

legislative history of Rule 301 make clear that Congress did not intend to accord presumptions the expansive interpretation espoused by the Eighth Circuit.

A. General Procedural Rules, Including the Federal Rules of Evidence, Govern Employment Discrimination Litigation

This Court has stated numerous times that civil rights litigation is subject to the same procedural rules as other civil litigation. *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2118 (1989)("usual method for allocating persuasion and production burdens in the federal courts"); *id.* at 2133 (Stevens, J., dissenting) ("Ordinary principles of fairness require that Title VII actions be tried like 'any lawsuit'"); *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1792 (1989) (Brennan, J.) ("Conventional rules of civil litigation generally apply to Title VII cases"); *Patterson v. McLean Credit Union*, 485 U.S. 620 (1988) (per curiam) ("We do not believe that the Court may recognize any such exception to the abiding rule that it treat all litigants equally: that is, that the claim of any litigant for the application of a rule to its case should not be influenced by the Court's view of the worthiness of the litigant in terms of extra legal criteria"); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 718 (1983). *See also* 110 Cong. Rec. 7214 (1964)(Interpretive Memorandum submitted by Sen. Clark & Sen. Clifford)

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[3] (...continued)

Presumptions in General in Civil Actions and Proceedings. In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

("[T]he plaintiff, as in any civil case, would have the burden of proving that discrimination had occurred"). This recognition reflects the will of Congress manifested in the statutorily enacted Federal Rules of Evidence.

Accordingly, F.R.E. 301 (which governs use of presumptions) is fully applicable to the *McDonnell-Burdine* "*prima facie* case" presumption.[4] Presumptions are governed by Rule 301 in the absence of a statutory exception; and federal employment discrimination statutes do not create any such exceptions for disparate treatment cases.[5]

Rule 301 of the Federal Rules of Evidence, both as proposed and as adopted, governs all presumptions in civil litigation under federal statutes. The language of all of the draft versions of Rule 301 reflects that the rule was intended to govern all presumptions in civil litigation as a general matter. 1 D. Louisell & C. Mueller, *Federal Evidence* § 68 at 540. Only presumptions created specifically by Act of Congress and whose terms conflict with the provisions of the rule were excepted. 10 J.

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[4] The term "*prima facie* case" has two distinct meanings. It is sometimes used to denote the evidence necessary for a plaintiff to establish a rebuttable presumption of liability, the legal consequences of which are governed by Rule 301. It also refers to a more limited concept: it describes the plaintiff's burden of producing sufficient evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, *Evidence* § 2494 (3d ed. 1940). The Court has made clear that it is employing the former definition of "*prima facie* case" when using that term in the Title VII context. *Burdine*, 450 U.S. at 254 n.7. Indeed, the Court regularly has used the term "presumption" (as opposed to the weaker term, inference) in its discussion of the effect of establishment of a "*prima facie* case" in employment discrimination cases. *See, e.g., id.*, at 255 n.8.

[5] No court has ever held that the *McDonnell-Burdine* presumption is excepted from Rule 301 coverage. We note that while a few courts have entertained the notion that there is such a thing as a non-statutory exception to Rule 301, those decisions are in a distinct minority, and none touch upon Title VII disparate treatment law. 1 D. Louisell & C. Mueller, *Federal Evidence* § 68 at 540 (1977).

Moore, *Moore's Federal Practice* ¶ 301.02, at III-14 ("If the statute does not declare the effect [of a presumption] then . . . Rule 301 would govern"). As to all other presumptions, including presumptions created by common law or judicial construction and accorded greater weight by those sources, Rule 301 would govern. *See Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 208 (1973); *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 336 (1971); 10 J. Moore ¶ 301.03[2], at III-18.

In the debates over Rule 301, and with respect to the Federal Rules of Evidence in general, there was no suggestion that these rules would not apply to Title VII. There is also no suggestion in the legislative history of the rules of evidence that Title VII itself provided for a different treatment of presumptions. Indeed, the language of the rule was modified twice to ensure that it would apply to all civil proceedings, and apply to no criminal matters. There is no suggestion that Congress intended to reverse the Court's preference for a uniform treatment for presumptions, except where "otherwise provided for by Act of Congress." *See* Subcommittee Note, Subcomm. on Crim. J., House Comm. on the Judiciary, 93rd Cong., 1st Sess. (Committee Print (1973)), reprinted in *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 221, 256 (1973) (hereinafter "*House Hearings*"); 9 J.H. Wigmore, *Evidence in Trials at Common Law* § 2493f, at 328 (quoting 18 A.L.I. Proceedings at 226).

B. Rule 301 of the Federal Rules of Evidence Follows the View of Presumptions Propounded by Professor Thayer

For much of this century, legal scholars have debated the weight that ought to be accorded to legal presumptions. The more expansive view of the legal effect of

presumptions has long been associated with Professor E. M. Morgan, while a far more limited view of the effect of presumptions is associated with Professor James B. Thayer and his followers. Both the language and legislative history of Rule 301 make clear that Congress, in adopting the Federal Rules of Evidence, adopted the limited Thayer approach to presumptions. The approach adopted by the Eighth Circuit -- which granted stronger effect to the *McDonnell-Burdine* presumption and relieved Hicks of a portion of his burden of persuasion -- is wholly inconsistent with the Thayer approach codified by Congress in the Federal Rules of Evidence.

In order to make clear just how inconsistent the Eighth Circuit's approach is with the approach mandated by Rule 301, *amici* believe that a somewhat detailed review of events leading up to adoption of Rule 301 is warranted.[6]

In the years preceding enactment of the Federal Rules of Evidence, legal scholars had debated the proper operational effect of presumptions. The two primary theories were that championed by Professors Thayer and J.H. Wigmore, and that championed by Professors Morgan and McCormick. Professors Thayer and Wigmore argued that a presumption shifted merely the burden of production or "articulation" of evidence, but not the burden of persuasion, and then vanished upon the introduction of evidence that would support a finding of the non-existence of the presumed fact. J.B. Thayer, *Preliminary Treatise on Evidence at the Common Law* 336 (1898) (reprinted by Augustus M. Kelley, 1969). Professors Morgan and McCormick believed that a presumption shifted both the burden of production and the burden of persuasion. E.M. Morgan, *Basic Problems of Evidence* 36 (1961). While

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[6] For a more detailed history, *see* Beard, *Title VII and Rule 301: An Analysis of the Watson and Atonio Decisions*, 23 Akron L. Rev. 105 (1989).

there were other theories,[7] most participants in the debate were convinced that the choice was between Thayer and Morgan. J.B. Weinstein and M.A. Berger, *Weinstein's Evidence*, § 300[01], at 300-5, (quoting 18 A.L.I. Proceedings 210-213 (1941). Ultimately, the Advisory Committee (appointed by Chief Justice Warren in 1965 to formulate rules of evidence for the federal courts) recommended that the view of presumptions advocated by Professor Morgan be accepted over the view of Professor Thayer. This recommendation was accepted by the Court. F.R.E. 301 Advisory Committee's Note. The language of the proposed rule gave presumptions virtually the effect of an affirmative defense. Weinstein, § 300[03], at 530.

The view of presumptions championed by Professors Morgan and McCormick provided that presumptions were created for reasons of policy rather than probability; therefore, a presumption should "permanently alter the burden of persuasion. No matter how much contradictory evidence was introduced indicating the nonexistence of the presumed fact, the burden of persuasion was always on the adverse party." *Rules of Evidence: Hearings on H.R. 5463 Before the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. 138 (1974)(hereinafter "*Senate Hearings*")(Statement of Richard H. Keatinge, Chrmn., Cal. Evid. Law Rev. Comm'n). This view of presumptions enjoyed substantial support among the academic community. *See, e.g.*, 1 Louisell & Mueller § 65 at 522-523.

Professor Thayer had advocated the so-called "bursting bubble" theory in which a presumption vanishes upon the introduction of evidence that would support a finding of the nonexistence of the presumed fact. The Court rejected the Thayer theory as according presumptions too "slight

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[7] *See, e.g.*, Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. Pa. L. Rev. 307 (1920).

and evanescent an effect." Advisory Committee Note Rule 301, quoted in Weinstein at 301-313.[8]

The recommendation of the Advisory Committee and the Court to adopt the Morgan approach met with substantial opposition on the grounds that a Morgan presumption shifted too great a burden of proof. Weinstein, § 301[01], at 301-18 to 301-19 & n.2. The House of Representatives adopted a compromise between the Morgan theory and Thayer theory. *See* 10 J. Moore, *Moore's Federal Practice*, ¶ 301.01[7], at III-11 (2d ed. 1988). Although supported by several powerful groups (including the Association of Trial Lawyers of America), the House compromise was in turn also severely criticized and made little headway in the Senate. *See Senate Hearings* at 56-58 (statements by the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States, criticizing the House compromise).

During the Senate's consideration of Rule 301, substantial support for the Thayer-Wigmore "bursting bubble" theory was submitted. One Thayer supporter, Congressman David W. Dennis, stated:

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[8] Edward W. Cleary, Reporter for the Advisory Committee on the Federal Rules of Evidence, argued against the bursting bubble theory on the basis that "presumptions embody the same considerations of fairness, policy, and probability that underlie the process of allocating responsibility for the elements of a case between the plaintiff and defendant in the guise of *prima facie* case and affirmative defense, and therefore are entitled to greater effect than accorded by the bursting bubble theory." *House Hearings* at 92. *See* Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 913 (1937). Professor Morgan described the minimum proof needed to rebut a Thayer presumption as being "some testimony is put in which anybody can disbelieve, which comes from interested witnesses, and which is of a sort that is usually disbelieved . . . evidence which may be disbelieved by the trier of fact." 9 Wigmore § 2493j, at 328 (quoting Professor Morgan, 18 A.L.I. Proceedings 221-222).

> . . . In my view a presumption simply imposes on the party against whom it is directed the burden of going forward with the evidence -- and that is all it does. The burden of proof never shifts. The presumption disappears when countervailing evidence is introduced. The problem is one of the most complicated in the law of evidence; but I believe this is sound theory, and that calling it a "bursting bubble" does not make it less so.

Senate Hearings at 12.

Similarly, Richard H. Keatinge, Former Chairman, California Evidence Law Revision Commission, supported the bursting bubble theory explicitly:

> Adoption of the "bursting bubble theory" will encourage the use of presumptions. . . . [T]he use of presumptions in this manner will still serve to expedite trials. . . . The minute controverting evidence is introduced the presumption should disappear . . . . Once controverting evidence is introduced the presumption ceases to have any value. In our California code we have the specific provision that presumptions are not evidence and they affect merely the burden of producing evidence. . . . [I]f we have to make a choice it would definitely be the "bursting bubble theory," because once the controverting evidence is introduced, as a practical matter, you know that the jury or the judge is going to look at both sides of the case anyway, and, as a practical matter, I don't care how the instruction is given, or how you handle it, both sets of evidence, both for and against the basic facts, are going to get weighed by the finder of fact whether a jury or judge. Therefore, as a practical matter, if you have to make a choice, the "bursting bubble" is the choice.

Id. at 196-197 (Testimony of Richard A. Keatinge). The Thayer rule had previously been accepted by the American Law Institute and the Model Code of Evidence. Weinstein, § 300[01] at 300-5.

In the face of increasing support for the Thayer approach, the Senate rejected both the Morgan approach and the House compromise and instead adopted a version of Rule 301 that essentially was the Thayer "bursting bubble" approach. The Senate version of Rule 301 (which was *identical* to Rule 301 as finally enacted) read:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

120 Cong. Rec. 36925 (1974).[9]

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[9] The Senate Report on Rule 301 was critical of the House version of the rule as well as the Supreme Court's recommendations. It read in part:

> The rule governs presumptions in civil cases generally. . .
>
> As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the non-existence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.
>
> Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that "even though met with contradictory evidence, a presumption is sufficient evidence of the fact presumed, to

(continued...)

The conference committee appointed to iron out difference between the House and Senate versions of Rule 301 accepted the Senate language. The Conference Report describes the effect of that decision:

> The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

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[9] (...continued)
be considered by the trier of fact." The effect of the amendment is that presumptions are to be treated as evidence.

> The committee feels that the House amendment is ill-advised. . .
>
> . . . The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in this first instance.
>
> The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7055-56.

> Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

H. R. Conf. Rep. No. 1597, 93rd Cong., 2d Sess., *reprinted in* 1974 U. S. Code Cong. & Admin. News 7098, 7099.

While the conference committee language is somewhat ambiguous regarding the meaning of Rule 301, one thing is clear: Congress decisively rejected the Morgan view of presumption that had been recommended to it by the Court. Indeed, to the extent that the conference committee's understanding of Rule 301 can be said to deviate from the Thayer view, it is not toward a stronger view of the effect of a presumption (the Morgan view) but toward a lesser view of the effect of a presumption in which a finding for the plaintiff is not compelled, but merely permitted ("*may* presume the existence of the presumed fact"), when the defendant fails to offer any contradicting rebuttal evidence. *See* Belton, *Burdens of Pleadings and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1235-36 (1981).

In sum, the history of adoption of Rule 301 makes clear not only that Congress favored giving decreased effect to presumptions, but also that it knew precisely what it was doing. Both the Advisory Committee and the

Supreme Court had recommended adoption of the Morgan view, so Congress was well aware of the views of those who criticized the Thayer approach. It was aware, for example, of Professor Morgan's criticism (*see* Note 8, *supra*) that a Thayer presumption is defeated by *any* admissible rebuttal evidence, even evidence that is inherently unbelievable and that is, in fact, disbelieved by the trier of fact. Yet, despite that awareness, Congress still opted for the Thayer approach.

The Eighth Circuit's interpretation of the *McDonnell-Burdine* presumption cannot be squared with the Thayer approach. Under the Thayer approach, the *McDonnell-Burdine* presumption should have dropped totally from this case the moment Petitioners presented evidence of a nondiscriminatory motive for Hicks's demotion and discharge. It makes no difference under the Thayer approach how credible and credited Petitioners' evidence was. A presumption does not require the opposing party to carry any burden of persuasion or to present evidence meeting *any* minimum credibility standards; it is enough under the Thayer approach if the opposing party comes forward with *some* relevant evidence which, if believed, would support a finding contrary to the presumed fact.[10]

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[10] Under Rule 301, the *prima facie* case disappears from the case once it is rebutted and has no further effect in the litigation. *See* 1 Louisell & Mueller, § 69 at 555; E.M. Morgan, *Basic Problems in Evidence* 34-35 (1961); Weinstein, § 300[01], at 300-3. This evidence must be more than "a scintilla," but need not in fact be believed. *See House Hearings* at 92 (Statement of Edward W. Cleary). Professor Morgan describes the minimum proof needed to rebut a Thayer presumption as being "some testimony is put in which anybody can disbelieve, which comes from interested parties, and which is of a sort that is usually disbelieved ... evidence which may be disbelieved by the trier of fact." 9 Wigmore, § 2493f at 328 & n.6 (*quoting* 18 A.L.I. Proceedings 221-222). Professor Cleary described the "bursting bubble" theory as being that "a presumption disappears from the case upon the introduction of evidence sufficient to support of findings of the nonexistence of the presumed fact, even though no one believes that evidence." *House Hearings* at 92. The case is decided as though there had never been a presumption or a prima facie case. In a jury (continued...)

The Eighth Circuit erred in holding that the presumption of racial discrimination sprung back to life the moment Hicks demonstrated that Petitioners' rebuttal evidence was false, because in doing so the court of appeals was placing on Petitioners far more than simply a burden of producing evidence.

C. Burdine Recognizes that Rules 301 Adopts the Thayer View

Whatever doubt may have existed regarding the meaning of Rule 301 and its applicability to employment discrimination cases was laid to rest in *Burdine*. Writing for the Court in *Burdine*, Justice Powell left no cause for doubt that Congress -- in amending proposed Rule 301 -- fully accepted the view of presumptions as articulated by Thayer in 1898, the "bursting bubble" view of presumptions.

Justice Powell's discussion of the nature of the evidentiary burden placed upon a defendant in a disparate treatment employment discrimination lawsuit (written six years after adoption of the Federal Rules of Evidence) could have come straight out of Professor Thayer's treatise. *See Burdine*, 450 U.S. at 252-256. Indeed, in support of his statements that the employer in a Title VII case "rebut[s]" the *prima facie* case presumption by setting forth evidence of nondiscriminatory reasons for its conduct, that the presumption thereafter "drops from the case," and that thereafter "the factual inquiry proceeds to a new level of inquiry," Justice Powell cites explicitly to Thayer's treatise. *Id.* at 255 & n.10.

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[10] (...continued)
case, the word "presumption" and its effects would not even be mentioned in jury instructions. Morgan, at 40-42; Weinstein, § 300[01], at 300-4-300-5; § 301[02], at 301-29.

The Court's subsequent decision in *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115 (1989), made explicit the Court's reliance on Rule 301 in assigning evidentiary burdens in employment discrimination cases. The Court said:

> This rule [assigning the burden of persuasion on the issue of discrimination to the plaintiff *at all times* in an employment discrimination case] conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. *See [Burdine]*.

Wards Cove, 109 S. Ct. at 2126.[11]

In sum, this Court's decisions make clear that the Court accepts the applicability of Rule 301 to disparate treatment employment discrimination cases in general and to the *McDonnell-Burdine* presumption in particular. Under Thayer and Rule 301, there can be no doubt that the *McDonnell-Burdine* presumption, like any other presumption, has no further effect once the employer comes forward with some evidence (no matter how credible that evidence is later judged to be) that articulates a nondiscriminatory rationale for the employer's action. In light of Rule 301, the Eighth Circuit's decision to the contrary should be reversed.

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[11] The *Wards Cove* dissent, while disputing the applicability of Rule 301 to disparate impact cases, agreed that Rule 301 applies to cases (such as disparate treatment cases) that involve "shifting of evidentiary burdens upon establishment of a presumption." *Wards Cove*, 109 S. Ct. at 2132 n.18 (Stevens, J., dissenting).

III. APPLICATION OF RULE 301 TO THE *McDONNELL-BURDINE* PRESUMPTION DOES NOT UNFAIRLY HAMPER PLAINTIFFS

Application of Rule 301 to the *McDonnell-Burdine* presumption cannot fairly be criticized as overly burdensome on employment discrimination plaintiffs. Even without the expansive interpretation accorded it by the Eighth Circuit, the presumption still serves important functions in assisting a disparate treatment employment discrimination plaintiff to meet his burden of persuasion.

First, the *McDonnell-Burdine* presumption permits a plaintiff to prevail automatically if the employer fails to come forward with a nondiscriminatory explanation for its disputed conduct. Second, by forcing the employer to explain itself, the presumption assists the plaintiff in focusing the case on the employer's actual motivations. Moreover, forcing the employer to explain itself increases the plaintiff's opportunities to create inferences of invidious discrimination; for example, if the plaintiff can demonstrate that the employer's explanation is false, it is reasonable to infer that the employer was being deceitful in order to mask invidious discrimination.

Most importantly, because Rule 301 is based on considerations of probability, not policy, application of the rule does not deprive the plaintiff of the benefit of the evidence he introduced for purposes of establishing his *prima facie* case. After the presumption raised by a *prima facie* case of disparate treatment is rebutted, the basic facts that gave rise to the *prima facie* case are still available to show intent:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial

> evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether or not the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Burdine, 450 U.S. at 255 n.10.

Undoubtedly, it would be easier for plaintiffs to prevail in disparate treatment employment discrimination cases if the Eighth Circuit's interpretation of the *McDonnell-Burdine* presumption were adopted by the Court. But any such adoption would be at the expense of a basic tenet of disparate treatment employment discrimination law: that a plaintiff may not prevail in a disparate treatment case without demonstrating that the employer acted with invidious discriminatory intent.

That basic tenet has met with virtually universal acceptance among the Justices. For example, Justice Stevens, in his dissenting opinion in *Wards Cove* (joined by Justices Blackmun, Brennan, and Marshall), stated:

> In a disparate treatment case *there is no "discrimination" within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race*. Therefore, the employee retains the burden of proving the existence of intent at all times. If there is direct evidence of intent, the employee may have little difficulty persuading the factfinder that discrimination has occurred. But in the likelier event that intent has to be established by inference, the employee may resort to the *McDonnell/Burdine* inquiry. In either instance, the employer may undermine the employee's evidence but has no independent burden of persuasion.

Wards Cove, 109 S. Ct. at 2131 (Stevens, J., dissenting) (emphasis added). *But see Aikens*, 460 U.S. at 718 (Blackmun, J., concurring).

The Eighth Circuit's opinion suggests at least two methods by which a disparate treatment plaintiff may prevail without carrying his burden of persuasion on the issue of invidious discrimination. One method is to show that the employer has provided the trial court with a false explanation for its conduct. Pet. App. A10. The other method suggested by the Eighth Circuit is to show that the employer acted as a result of some "personal," non-business-related motivation. *Id.* Acceptance of either of those methods would overturn decades of employment discrimination law, by basing Title VII disparate treatment liability on something other than a finding of discrimination on the basis of race, color, religion, sex, or national origin.

It bears repeating that evidence of the type which the Eighth Circuit contends *mandates* entry of judgment for the plaintiff is undoubtedly evidence from which a trial court could reasonably infer invidious discriminatory motive. But it is just as plain that *not every employer* that is less than candid to a court about its motives (or that allows personnel decisions to be made based on "personal" motives) has acted with invidious discriminatory intent. Accordingly, a trial court ought to be permitted to review all of the evidence in determining the ultimate issue of discriminatory intent.

The trial court determined, after reviewing all of the evidence, that Hicks failed to demonstrate by a preponderance of the evidence that Petitioners discriminated against him on the basis of race. In the absence of a holding that the district court's finding was clearly erroneous, it should have been affirmed.

The purpose of our civil rights laws is to prohibit employment decisions based on race, color, religion, sex,

or national origin, not to restrict or regulate non-invidious employment decisions. Any conclusion that disparate treatment liability can be based on proof of something other than invidious discrimination not only is without support in the legislative history of the relevant statutes and the decisions of this Court, but also contradicts the rhetorical and moral bases advanced in the past 50 years in support of such enactments.

CONCLUSION

Amici respectfully request that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

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IN THE

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OCTOBER TERM, 1992

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND OTHERS* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND OTHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), the American Civil Liberties Union ("ACLU"), the Women's Legal Defense Fund ("WLDF"), the American Association of Retired Persons ("AARP"), the National Women's Law Center ("Center") and the Mexican American Legal Defense and Educational Fund ("MALDEF") respectfully submit this brief as *amici curiae*. The written consents of the parties are being filed with the Clerk of this Court simultaneously with this brief. This brief urges affirmance of the Eighth Circuit's decision in *Hicks* v. *St. Mary's Honor Center and Steve Long*, 970 F.2d 487 (8th Cir. 1992), and thus supports the position of respondent.

INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee is a nonprofit organization that was established at the request of the President of the United States in 1963, to involve leading members of the bar throughout the country in the national effort to insure civil rights to all Americans. It has represented and assisted other lawyers in representing numerous plaintiffs in administrative proceedings and lawsuits under Title VII. *See, e.g., Lewis* v. *Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *See, e.g., Wards Cove Packing Co., Inc.* v. *Atonio*, 490 U.S. 642 (1989); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Connecticut* v. *Teal*, 457 U.S. 440 (1982); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving and enhancing the fundamental civil rights and civil liberties embodied in the Constitution and civil rights laws of this country. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination in our society. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of gender-based discrimination in our society. In pursuit of that goal, the ACLU has participated in numerous discrimination cases before this Court.

The WLDF is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. The WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, the WLDF has placed special emphasis on equal employment opportunity for

women of color, who often face job discrimination based on both race and gender.

The AARP is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of the AARP's thirty-four million members are employed, most of whom are protected by Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e) *et seq.* (1988) and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (1967) ("ADEA"). One of the AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices and policies regarding work and retirement. In pursuit of this objective, the AARP has participated as *amicus curiae* in numerous discrimination cases before this Court and the federal courts of appeals.

The Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Full enforcement of Title VII is essential in order to provide women equal opportunity in the workplace. Consequently, the Center has a deep and abiding interest in ensuring that Title VII continues to protect women from workplace discrimination.

The MALDEF is a national nonprofit civil rights organization established in 1967. Its principal objective is to secure the civil rights of Latinos in the United States through litigation and education. It has frequently represented plaintiffs in all phases of litigation under Title VII and appeared as an *amicus* in federal courts, including cases before this Court.

The question presented by this case raises important and recurring issues. The vast majority of the employment discrimination cases filed each year under Title VII and ADEA involve disparate treatment claims. In most of those cases, there is no direct evidence of discrimination. In evaluating what is largely circumstantial evidence, courts are bound by the three-part standard established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) and in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). That framework permits triers of fact to infer

intentional discrimination by determining whether the employer's stated reasons for the challenged employment action are a pretext for discrimination. *Burdine*, 450 U.S. at 253, 256.

The Lawyers' Committee, the ACLU, the WLDF, the AARP, the Center and the MALDEF have an interest in ensuring that this Court adopts principles that will result in the sound administration of the discrimination laws, so that persons with legitimate claims and limited resources will be able to prevail. This Court's decision will have far reaching and important implications for present and future employment discrimination cases in which the Lawyers' Committee, the ACLU, the WLDF, the AARP, the Center and the MALDEF participate.

STATEMENT OF THE CASE

Melvin Hicks filed suit against his former employer, St. Mary's Honor Center, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1988), and against the superintendent of that facility, Steve Long, under 42 U.S.C. § 1983 (1988).[1/] After he was demoted and then terminated from his position as shift commander, Hicks alleged that St. Mary's and Superintendent Long had discriminated against him on the basis of his race (he is an African-American). *Hicks* v. *St. Mary's Honor Center*, 756 F. Supp. 1244, 1245-46 (E.D. Mo. 1991) (Petition Appendix A-14–A-15).

A. Background

Hicks was hired as a correctional officer by St. Mary's, a minimum security correctional facility, in 1978. In 1980, he was promoted to shift commander, a supervisory position. Between 1978 and February 1984, Hicks' job performance was satisfactory.

[1/] Hicks also alleged that St. Mary's and Superintendent Long had violated 42 U.S.C. § 1981 (1988). Petitioners were granted summary judgment on this claim. *Hicks* v. *St Mary's Honor Center*, 756 F. Supp. 1244, 1245 (E.D. Mo. 1991) (Petition Appendix A-14).

He was never suspended, disciplined or demoted.[2/] (Pet. App. A-15—A-16).

The administration at St. Mary's changed dramatically in January 1984. The Chief of Custody and two shift commanders, all of whom were African-Americans, were replaced with whites. (Pet. App. A-15). Hicks was the only remaining African-American shift commander, and one of only two African-Americans left in a supervisory position. Hicks' new immediate supervisor, Captain John Powell, and the new superintendent of the facility, Steve Long, were both white. (Pet. App. A-15, A-2). These changes in the administration were made in the wake of a 1980-1981 study of St. Mary's and another honor center, which had concluded that "too many blacks were in positions of power at St. Mary's[.]" (Pet. App. A-21).

B. The "Crusade to Terminate" Hicks

After the change in administration, Hicks was disciplined in connection with three separate incidents.

On March 3, 1984, a white transportation officer at St. Mary's observed, and reported to Captain Powell, a number of minor violations of institutional rules committed by Hicks' subordinates during Hicks' shift. Although Hicks, who was performing a perimeter check of St. Mary's, was not present to observe or correct these alleged violations, a disciplinary review board recommended that he receive five days' suspension.[3/] The officers who were present and were responsible for the violations were not disciplined in any way. Although Captain Powell testified that it was his policy to discipline only the shift commander for violations occurring during his shift, white shift commanders were

[2/] In 1980, while he was on vacation, Hicks had mistakenly been cited for absence without notice. (Pet. App. A-16 n.4).

[3/] The disciplinary review board makes recommendations to the Superintendent who recommends action to the Director of the Missouri Department of Corrections and Human Resources, who then makes the ultimate disciplinary decision. (Pet. App. A-17 n.6).

not disciplined for rule violations committed by employees under their supervision. (Pet. App. A-16—A-17, A-24—A-26).

On March 19, 1984, Hicks permitted two correctional officers to use a St. Mary's vehicle. Neither of the correctional officers, nor the control center officer, logged the use of the vehicle as per institutional rules. Captain Powell brought charges against Hicks for failure to log the use of the vehicle. Neither the correctional officers who borrowed the vehicle nor the control center officer were disciplined. (Pet. App. A-17—A-18).

On March 24, 1984, Captain Powell charged Hicks with failing to investigate an inmate assault, even though Hicks had notified Captain Powell in writing of the incident and had instructed another correctional officer to submit a full report. On March 29, 1984, Captain Powell issued Hicks a letter of reprimand, citing his failure to investigate the assault. (Pet. App. A-18).

On April 19, 1984, Hicks was notified that he had been demoted from shift commander to correctional officer I as a result of the incident involving the borrowed vehicle. (Pet. App. A-17, A-18). According to the district court, Captain Powell and Hicks "exchanged heated words" shortly thereafter, when Captain Powell demanded that Hicks turn over his shift commander's manual. (Pet. App. A-18). The district court so found even though Captain Powell testified that he was not angry, and did not raise his voice or attempt to provoke Hicks. (Joint Appendix 38, 44, 46). Captain Powell sought disciplinary action against Hicks, claiming that Hicks had threatened him. (Pet. App. A-18).

On May 9, 1984, a disciplinary review board voted to suspend Hicks for three days. (Pet. App. A-18 - A-19). However, Superintendent Long disregarded the board's recommendation and recommended that Hicks be terminated based on the "severity and accumulation of [his] violations." (Pet. App. A-19). On June 7, 1984, Hicks was terminated. He was replaced by a white male. (Pet. App. A-19, A-23).

C. The Findings of the District Court

In reviewing the facts of the case, the district court found that:

> (1) "plaintiff was mysteriously the only person disciplined for violations actually committed by his subordinates[;]"
>
> (2) "plaintiff demonstrated . . . [that Captain Powell's] policy [of disciplining only shift commanders] only applied to violations which occurred on plaintiff's shift[;]"
>
> (3) "much more serious violations, when committed by plaintiff's [white] co-workers, were either disregarded or treated much more leniently[;]"
>
> (4) "plaintiff was treated much more harshly than his [white] co-workers who committed equally severe or more severe violations[;]" and
>
> (5) "plaintiff has proven the existence of a crusade to terminate him[.]"

(Pet. App. A-23 - A-27).

The district court determined that, under the *McDonnell Douglas-Burdine* standard, Hicks had established a *prima facie* case of racial discrimination, and also that he had proven petitioners' proffered reasons for his demotion and termination -- his purported infractions of institutional policies -- were not the actual reasons for his discharge. (Pet. App. A-22 - A-23, A-26, A-29).

Nonetheless, the court entered a verdict in favor of the defendants. The court decided that Hicks had not proven that his demotion and termination were the result of racial discrimination. The court determined, *sua sponte*, that "although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally

motivated." (Pet. App. A-27). Personal animosity was not proffered by petitioners as a possible explanation for their behavior, and Hicks had no opportunity to rebut this explanation at trial. Indeed, at trial, Captain Powell denied any suggestion that he had prompted a confrontation with Hicks and testified that there were no difficulties between the two men. (J.A. 38, 44, 46).

The district court made its finding despite the other evidence of racial discrimination at St. Mary's introduced by Hicks, particularly discrimination against African-Americans in supervisory positions. For example, Hicks demonstrated that:

> (1) approximately twelve African-Americans had been terminated by the new white administration at St. Mary's between January 1984 and December 1984, while only one white had been terminated;
>
> (2) prior to 1984, only the superintendent of St. Mary's was white, while the assistant superintendent, chief of custody and three shift commanders were African-American -- after Superintendent Long was hired, the assistant superintendent and plaintiff were the only remaining African-Americans in supervisory positions;
>
> (3) five of the ten white employees on the custody roster at St. Mary's as of April 1984 had been promoted; and
>
> (4) a 1981 study of St. Mary's and another honor center concluded that "too many blacks were in positions of power at St. Mary's[.]"

(Pet. App. A-27—A-28, A-21, A-6 n.6).

D. The Eighth Circuit's Decision

The Eighth Circuit reversed the district court's decision. The panel correctly determined that "it was improper for the district court to assume—without evidence to support the assumption—that defendants' actions were somehow 'personally

motivated.'" *Hicks* v. *St. Mary's Honor Center*, 970 F.2d 487, 492 (8th Cir. 1992) (Pet. App. A-10). The court further held that once the plaintiff "has met his or her burden of proof at the pretext stage . . . then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required." (Pet. App. A-11).

SUMMARY OF ARGUMENT

In *McDonnell Douglas* and *Burdine*, this Court created a sensible, orderly and just framework for proving intentional discrimination based on circumstantial evidence. That framework provides that once a plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action in question. This burden is not heavy -- it merely requires the employer to articulate its actual reason or reasons for its decision. If the employer satisfies this burden, then the employee is provided with a "full and fair opportunity" to demonstrate that the employer's rationale is pretextual, *i.e.*, that it was not the actual motivating reason(s). If the employee proves pretext, then a finding of liability is compelled because the employer's theory has been defeated or disproved, leaving discrimination as the proper inference for the underlying motivation.

If this Court were to hold that an employee must do more than prove pretext in order to prevail, then it would effectively be requiring the employee to proffer direct evidence of discrimination. As will be demonstrated below, a Title VII plaintiff has no viable alternative. Yet over the last twenty years, this Court has consistently and repeatedly rejected the notion that a plaintiff must introduce direct evidence of discrimination. Thus, affirming the Eighth Circuit's decision will preserve the plaintiff's opportunity to prove his or her case through circumstantial evidence.

ARGUMENT

I.

THE EIGHTH CIRCUIT'S DECISION IS CONSONANT WITH THE PRIOR HOLDINGS OF THIS COURT

Introductory Statement

In enacting Title VII, Congress sought to protect workers both in situations where discrimination is blatant and where it is subtle. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and subsequent decisions have acknowledged that, while discrimination in the workplace is widespread, direct evidence of discrimination rarely exists. Consequently, this Court provided a mechanism by which plaintiffs could prove their discrimination claims through indirect evidence where direct evidence was lacking.

The proof structure in individual disparate treatment cases was first set forth in Justice Powell's unanimous decision in *McDonnell Douglas*. Under *McDonnell Douglas*:

> (1) the plaintiff must establish a *prima facie* case of discrimination—this creates a rebuttable presumption that the defendant has discriminated against the plaintiff;
>
> (2) in order to rebut the presumption of discrimination, the defendant must proffer "some legitimate, nondiscriminatory reason" for the employment decision; and
>
> (3) the plaintiff must then "be afforded a fair opportunity to show that [the defendant's] stated reason for [the plaintiff's] rejection was in fact pretext."

Id. at 802–804. Under this Court's decision in *Burdine*, the plaintiff can demonstrate pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or

indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. It is critical to the *McDonnell Douglas–Burdine* formulation that a plaintiff is not required to introduce direct evidence of discrimination in order to prevail. *See, e.g., Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977); *Burdine*, 450 U.S. at 256; *United States Postal Serv. Bd. of Govs.* v. *Aikens*, 460 U.S. 711, 714 n.3, 717 (1983).

Two competing views of the *McDonnell Douglas–Burdine* framework have developed in recent years concerning the proof a Title VII plaintiff must offer at the third, or pretext, stage.

Those courts that follow the literal language of *McDonnell Douglas–Burdine* hold that a discrimination plaintiff need only prove that the defendant's proffered reason for the adverse employment decision is pretextual in order to prevail. These "pretext only" courts adopt the reasoning of *Burdine*, in which this Court stated that at the third, or pretext, stage of the *McDonnell Douglas* order of proof, the plaintiff's burden of proving pretext "merges" with his or her ultimate burden of persuasion on the question of intentional discrimination. *Burdine*, 450 U.S. at 256. They reason that, once the plaintiff has shown the defendant's proffered explanation is untrue, the only remaining inference is that the defendant has discriminated. *See, e.g., Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). This "literal" approach to the *McDonnell Douglas–Burdine* analysis prevailed for approximately the first fifteen years after this Court announced the standard.

Another viewpoint, of relatively recent vintage, is advanced by the so-called "pretext-plus" courts. These courts contend that the plaintiff must prove that the defendant's proffered reasons are untrue, and also must demonstrate affirmatively that there can be no explanation for the defendant's conduct other than intentional discrimination. These courts assert that proving pretext at the third stage of the *McDonnell Douglas–Burdine* formulation is not synonymous with proving pretext for discrimination. In effect, the "pretext-plus" courts argue that, notwithstanding the literal language of *McDonnell Douglas*, *Burdine*, *Furnco* and subsequent decisions of this Court, the burdens of proving pretext and

intentional discrimination do not merge, so that a plaintiff can establish pretext without having proved discrimination.

As discussed below, it is the analysis of the "pretext only" courts that faithfully follows the language and underlying reasoning of the *McDonnell Douglas-Burdine* framework and this Court's subsequent decisions.

A. This Court Has Always Contemplated That Proof Of Pretext Is Tantamount To Proof Of Discrimination Entitling The Plaintiff To Prevail

The Eighth Circuit's ruling that Hicks was entitled to prevail once he proved that the reasons proffered by defendants were not the true reasons for his demotion and termination broke no new ground. On the contrary, it is consistent with this Court's many pronouncements on the subject. Specifically, this Court has held that (1) proof of pretext is proof of pretext for discrimination; and (2) once the plaintiff proves that the defendant's proffered explanation is pretextual, the only justifiable result is that the plaintiff must prevail on its discrimination claim because the defendant has offered no legitimate explanation for its conduct.

From the first, this Court made it clear that the pretext with which it was concerned was "a coverup for a . . . discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. In *McDonnell Douglas*, this Court stated:

> While Title VII does not, without more, compel rehiring of [plaintiff], neither does it permit [defendant] to use [plaintiff's] conduct as a *pretext for the sort of discrimination prohibited by § 703(a)(1).*

Id. at 804 (emphasis supplied). Proving pretext would be irrelevant unless the fair inference to be drawn from doing so was that discrimination was the unstated reason for the employer's action. For that reason, the *McDonnell Douglas* Court also held that the plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that *the presumptively valid reasons for his*

rejection were in fact a coverup [*i.e.*, a pretext] *for a racially discriminatory decision.*" *Id.* at 805 (emphasis supplied). The Court went on to state that, if the plaintiff proved that the employer's articulated rationale was "a pretext or discriminatory in its application[,]" the district court "must order a prompt and appropriate remedy." *Id.* at 807. In other words, if a plaintiff proves pretext, he or she prevails.

Any doubt that this Court equated "pretext" with a "coverup for a . . . discriminatory decision" was laid to rest in *Furnco*. In an opinion by Justice Rehnquist, this Court expanded on what was implicit in *McDonnell Douglas*:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the consideration of impermissible factors . . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Id. at 577 (emphasis in original and supplied). Thus, the Court recognized that if an employer who was charged with discrimination failed to explain his conduct on some other basis, it was more likely than not that the employer was guilty of discrimination. In *Furnco*, this Court explicitly equated "pretext" with "coverup for discrimination" when it stated: "The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination." *Id.* at 578.

The Court reiterated that equation in *Burdine*, the next major case discussing the Title VII burden of proof. In discussing

the third stage of the *McDonnell Douglas* standard, the *Burdine* Court stated: "[T]he plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were *a pretext for discrimination.*" *Id.* at 253 (emphasis supplied). The Court in *Burdine* was equally clear about how the Title VII plaintiff could meet his or her burden of proving pretext for discrimination:

> [The plaintiff] may succeed in . . . [proving that the reasons offered by the defendant were a pretext for discrimination] either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence.*

Id. at 256 (emphasis supplied).

Throughout the development of the *McDonnell Douglas-Burdine* framework, proving pretext by demonstrating that the nondiscriminatory reasons offered by the defendant were not the true motivation for its conduct has been deemed sufficient to carry the plaintiff's burden. As the Court held in *McDonnell Douglas*, sustaining that burden warrants judgment for the plaintiff. *Id.* at 807. Put otherwise, the plaintiff's burden to prove pretext ". . . merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256. As one commentator has noted:

> the Court [did not] intend[] this language [in *Burdine*] to impose two separate burdens on plaintiffs. The phrase "merges with" in *Burdine* cannot reasonably be understood to mean "is separate from." Rather, *the term "merge" should be given its ordinary meaning: "To cause to be absorbed as to lose identity."* When read in this common sense way, *Burdine* furnishes even more support for reading "pretext" as synonymous with "pretext for discrimination."

Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57, 120 (1991) (emphasis supplied).

Petitioners argue that this Court's opinion in *Aikens* imposes on Title VII plaintiffs an obligation to do more than prove that the employer's explanations are pretextual. In that case, the Court stated:

> [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case," . . . and "the factual inquiry proceeds to a new level of specificity."

Id. at 714–15 (quoting *Burdine*). From this, petitioners urge that this Court has imposed on Title VII plaintiffs a burden *in addition to* the old "merged" burden of proving discrimination by proving pretext and thereby eliminating defendants' proffered reasons as possible explanations.

That is simply not so. All this Court did in *Aikens* was recognize what is true in every civil case -- namely, that once a defendant produces evidence that runs contrary to a legal presumption, the plaintiff's *prima facie* case is no longer presumptively conclusive. *See* Fed. R. Evid. 301; 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 300[01] at 300–4 (1990). But, the fact that a presumption is *rebutted* does not mean that it is *discredited* or that the inference that was once presumed cannot still be drawn. Again, *Burdine* is instructive:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case . . . .

this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual.

Id. at 255 n.10.

In *Aikens*, this Court meant no more than that the trier of fact in a Title VII case, like the trier of fact in any civil case, must weigh each side's explanation and decide which version is more likely than not the correct version. On this point, the Court was quite explicit:

As we stated in *Burdine*:

> "The plaintiff retains the burden of persuasion . . . . *[H]e may succeed in this [burden]* either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence."* 450 U. S., at 256.

> In short, the district court must decide *which party's explanation of the employer's motivation it believes*.

Id. at 716 (emphasis supplied). Thus, once plaintiff proves that defendant's stated reason is pretextual the only remaining explanation for defendant's conduct is intentional discrimination.

B. The Inevitable Result Of The "Pretext-Plus" Argument Is To Put Title VII Plaintiffs On A Slippery Slope Toward A Direct Evidence Requirement, Thereby Vitiating The McDonnell Douglas-Burdine Standard

If there has been a consistent thread in the development of Title VII law, it has been that a plaintiff need not introduce direct evidence of discrimination in order to prevail. Under the *McDonnell Douglas-Burdine* analysis, plaintiff may prevail "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. The Court reaffirmed this rule in *Aikens*: "[T]he *McDonnell Douglas* formula does not require direct proof of discrimination." *Id.* at 714 n.3 *citing Teamsters*, 431 U.S. at 358 n.44. Indeed, this Court has previously held: "[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985).

The "pretext-plus" courts are careful to pay lip service to this requirement and to insist that they do it no violence. But the practical effect of their decisions is to impose on Title VII plaintiffs, either overtly or *sub silentio*, the requirement of producing the direct evidence of discrimination that this Court has recognized is elusive and seldom available. Two different lines of argument demonstrate that this will be the inevitable outcome of endorsing the "pretext-plus" standard.

First, the "pretext-plus" approach requires the plaintiff to read the mind of a non-party, to comb the record and try to fathom what conceivable explanations the trier of fact might find lurking there. Under this approach, the plaintiff cannot fulfill his or her ultimate burden of persuasion simply by rebutting the explanations proffered by the defendant – explanations that he or she has had a full and fair opportunity to examine and attack. The plaintiff must also identify and rebut all possible hidden motives that might appeal to the trier of fact. In some instances, the plaintiff might be placed in the untenable position of attempting to rebut a possible

explanation for the defendant's conduct that the defendant has expressly denied.

This very case proves the point. The district court ruled that Hicks had not proved that "personal motivation" was not the catalyst in the decision to terminate him. But Hicks had no reason to assume that he needed to rebut any inference that personal animosity toward him was the reason for his termination. Captain Powell denied that he had prompted a confrontation with Hicks or that he had any difficulties with him. (J.A. 38, 44, 46). Nor did petitioners introduce any evidence of personal animosity toward Hicks on the part of Superintendent Long, who actually made the recommendation to terminate Hicks. (Pet. App. A-19).

Because few, if any, Title VII plaintiffs could expect to prevail under such a system, the only realistic option is for a plaintiff to introduce direct evidence of discrimination. But, as this Court has repeatedly recognized, such a requirement would be all but impossible to meet. *See, e.g., Aikens*, 460 U.S. at 716 ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring in judgment) ("As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.")

Second, imposition of a direct evidence requirement, either overtly or *sub silentio*, would effectively eviscerate the plaintiff's ability to prevail, even in a meritorious case. The evidence of this proposition already exists. In the overwhelming majority of "pretext-plus" decisions cited to this Court by petitioners and their supporting *amici*, the defendant employer won. *See, e.g., E.E.O.C.* v. *Flasher Co.*, 60 Fair Empl. Prac. Cas. (BNA) 814 (10th Cir. 1992); *Galbraith* v. *Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992); *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990); *Holder* v. *City of Raleigh*, 867 F.2d 823 (4th Cir. 1989); *Benzies* v. *Illinois Dep't of Mental Health & Developmental Disabilities*, 810 F.2d 146 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987). This occurred whether or not the plaintiffs relied solely on an attempt to

prove pretext, *see, e.g., Medina-Munoz*; *Benzies*, or introduced other credible evidence from which the trier of fact could infer discrimination. *See, e.g., Villanueva* v. *Wellesley College*, 930 F.2d 124 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991); *Galbraith*; *Holder*; *Sims* v. *Cleland*, 813 F.2d 790 (6th Cir. 1987) (defendant prevailed although plaintiff proved that one of the proffered reasons was pretextual and introduced evidence of direct discrimination).

Again, this case is a prime example of the phenomenon. Hicks introduced a significant amount of evidence that tended to demonstrate discrimination against African-American supervisors at St. Mary's beginning in January 1984:

> (1) he was the only shift commander who was disciplined for violations actually committed by his subordinates -- white shift commanders were not similarly disciplined;
>
> (2) white co-workers who committed much more serious violations than Hicks were either not disciplined or were treated more leniently;
>
> (3) twelve African-Americans had been terminated at St. Mary's in 1984 while only one white had been terminated;
>
> (4) prior to 1984 there were one white and five African-Americans in supervisory positions -- after the 1984 personnel changes at St. Mary's there were four whites and two African-Americans in supervisory positions;
>
> (5) five of the ten whites on the St. Mary's custody roster as of April 1984 had been promoted; and
>
> (6) a 1980-1981 study of St. Mary's concluded that "too many blacks were in positions of power at St. Mary's[.]"

(Pet. App. A-21, A-23–A-28, A-6 n.6). Despite all this evidence, Hicks was unable to prevail.

In only one of the "pretext-plus" cases cited by petitioners did the plaintiff prevail after trial. In *Mister* v. *Illinois Central Gulf R.R. Co.*, 832 F.2d 1427 (7th Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988), the Seventh Circuit reversed a judgment for defendant against a class of African-American job applicants who had alleged racially discriminatory hiring practices because of unusually strong evidence of discrimination, which prompted the court to state: "It is hard to imagine a stronger case, short of an announcement of discrimination." *Id.* at 1430. The only other two cases cited by petitioners in which plaintiffs obtained a favorable decision were cases in which the defendant was unable to obtain summary judgment, either on motion or on appeal. *See Shager* v. *Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990); *Veatch* v. *Northwestern Memorial Hosp.*, 730 F. Supp. 809 (N.D. Ill. 1990). Interestingly, in both cases the plaintiffs survived summary judgment by introducing direct evidence of discrimination. *See Shager*, 913 F.2d at 402, and *Veatch*, 730 F. Supp. at 820.

Thus, the conclusion that must be drawn is the only conclusion that can be drawn: overturning the Eighth Circuit's decision and imposing a "pretext-plus" rule will mean that plaintiffs will be unable to prevail unless they can introduce direct evidence of discrimination, thereby reversing the underlying premise of *McDonnell Douglas*, *Burdine* and *Aikens* and undoing 20 years of consistent decisions under Title VII.

II.

ADOPTION OF THE "PRETEXT-PLUS" STANDARD WOULD EITHER DENY PLAINTIFFS A FULL AND FAIR OPPORTUNITY TO PROVE PRETEXT FOR DISCRIMINATION OR WOULD UNDULY COMPLICATE THE TRIAL OF TITLE VII CASES

A. The Plaintiff's Right To A Full And Fair Opportunity To Prove Pretext Requires The Defendant To Advance The Actual Reason For Its Actions Or Risk An Adverse Verdict

Under *McDonnell Douglas* and its progeny, the employer must proffer a reason that is both nondiscriminatory *and legitimate* in order to rebut the presumption raised by the plaintiff's *prima facie* case. This is not a heavy burden for a defendant to meet. However, it is a two-fold burden: the words "legitimate" and "nondiscriminatory" are not synonymous. "Nondiscriminatory" means not "applying or favoring discrimination in treatment," while "legitimate" means "being exactly as proposed: neither spurious nor false." *See* Webster's *New Collegiate Dictionary* (1977) at 327, 657. Thus, the Title VII defendant cannot accomplish the objective of producing evidence sufficient to rebut the presumption without offering the court the actual motivating reason.

That the employer was required to provide the actual justification for the adverse employment action taken against the plaintiff can fairly be inferred from the language of *McDonnell Douglas* and *Burdine*. Thus, in *McDonnell Douglas*, this Court stated that a Title VII plaintiff must "be afforded a fair opportunity to show that [defendant's] *stated reason* for [plaintiff's] rejection was in fact pretext." *Id.* at 804 (emphasis supplied); *Furnco*, 438 U.S. at 578 (same); *Burdine*, 450 U.S. at 253, 256 (same); *Aikens*, 460 U.S. at 716 n.5 (same). In *Burdine*, this Court made it clear that the defendant's burden of production did not encompass the proffer of a sham reason, but that the employer must come forward with its actual motivation:

> [T]he defendant's explanation of its legitimate reasons must be clear and reasonably specific. . . . This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case *and from the requirement that the plaintiff be afforded "a full and fair opportunity" to demonstrate pretext*.
>
> . . .
>
> the defendant's evidence [must] raise[] a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. *The explanation provided must be legally sufficient to justify a judgment for the defendant*.

Id. at 258, 254–55 (emphasis supplied). And as this Court held in discussing another aspect of Title VII, a defendant may not prevail "by offering a legitimate and sufficient reason for its decision *if that reason did not motivate it at the time of the decision*." *Price Waterhouse*, 490 U.S. at 252 (emphasis supplied).

Yet the "pretext-plus" courts hold -- openly and unabashedly -- that Title VII defendants can meet their burden of production at step two of the *McDonnell Douglas* formulation by producing some evidence of a nondiscriminatory reason for taking adverse action against the plaintiff, even if that reason is spurious and false -- *i.e.*, even if it is not the defendant's actual motivating reason. The "pretext-plus" courts actually reward defendants who proffer sham motivations for their actions by permitting them to prevail unless the plaintiff demonstrates that every plausible but unarticulated reason for the employer's action is false.

The clearest statement of this unorthodox approach to justice was set forth by the Seventh Circuit in *dictum* in *Pollard* v. *Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987):

> Showing that the employer dissembled is not necessarily the same as showing "pretext *for discrimination*," however, as we stressed in *Benzies*, it may mean that the employer is trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement.

(Emphasis in original). *See also Benzies*, 810 F.2d at 148 ("A demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law . . . . The trier of fact may find, however, that some less seemly reason—personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules—actually accounts for the decision."); *Villanueva*, 930 F.2d at 128 (". . . the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact."); *Veatch*, 730 F. Supp at 819 (although plaintiff survived defendant's summary judgment motion, the court noted that "[e]ven if the employer lies about the real reasons for the firing, other reasons, not impermissible under federal law, might be suggested by the evidence.")

The fear expressed by the "pretext-plus" courts is that a plaintiff will prevail in a Title VII case whenever the trier of fact disapproves of the defendant's employment decision, even if it was motivated by something other than the sort of discrimination forbidden by Title VII. In other words, the fear is that Title VII will become a "just cause" statute for all who fall under its protective scope. *Pollard*, 824 F.2d at 560–61.

But this fear is unfounded. If, for example, the defendant employer took an adverse employment action against a Title VII plaintiff because of a good faith mistake about the plaintiff's job performance, or out of an error in administering neutral employment rules, all that is required is that the employer come forward with its true motivation. The trier of fact should then find that the plaintiff loses because he or she failed to prove pretext.

That is precisely what occurred in *Pollard*, 824 F.2d at 559–60. There, the defendant employer argued that it had dismissed an employee because the employee had taken an unauthorized absence from work to attend a body-building event. The plaintiff proved that he had in fact been absent from work because he was injured—*i.e.*, he proved that the employer acted on the basis of a mistaken belief. However, as the Seventh Circuit found, the employer terminated the plaintiff because it believed in good faith (albeit mistakenly), that the plaintiff had missed work to attend the body-building event. Therefore, the Seventh Circuit reversed the district court, holding that the plaintiff had failed to prove pretext because the employer had terminated him based on its own good faith mistake. *Id.* at 559. *See also Billups* v. *Methodist Hosp. of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991) ("[O]ur inquiry is limited to whether the employer's belief was honestly held."); *Grohs* v. *Gold Bond Bldg. Products*, 859 F.2d 1283, 1288–89 (7th Cir. 1988), *cert. denied*, 490 U.S. 1036 (1989) (same); *Samuels* v. *Raytheon Corp.*, 934 F.2d 388, 392–93 (1st Cir. 1991) (same). That is decidedly different from the situation in which the plaintiff demonstrates that the defendant was not in fact motivated by the stated reason (*i.e.*, the employer did not really believe the plaintiff was taking an unauthorized absence, but stated it so believed to cover up some other motive.)

If, however, the employer proffers a pretextual justification in order to avoid disclosing that its real reason involved a violation of some other statute or regulation, or of its own procedures, there is no policy reason why the courts should protect the employer from having to disclose this violation in order to prevail against the discrimination charge. A defendant in a discrimination suit enjoys no privilege from disclosing the truth just because it happens to be unpalatable, or even illegal. In fact, offering an employer defendant such extraordinary protection could violate the plaintiff's rights to a full and fair hearing in another respect, because, as this Court has previously held, departures from regulations or ordinary procedures can be evidence of intentional discrimination. *See Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977).

It may be true that some triers of fact have found discrimination in cases where there was none, simply because they

were outraged at the defendant employer's conduct. That clear error, however, cannot justify a rule that permits, even encourages, employers to proffer false and spurious explanations for their conduct in order to justify a finding in their favor:

> [T]here is no rational reason for giving a defendant who has lied about the reasons for its actions a presumption that its lie does not conceal illegal conduct. In no other area of the law would a lying defendant be accorded such solicitude. Ordinarily lack of credibility may be considered as adverse evidence. There is no principled reason why the same result should not obtain here. To presume that a defendant who offered a false reason for its actions in court did so for benign reasons is illogical.

Lanctot, *supra*, at 133. Protecting an employer who lies about its true motives is at odds with traditional evidentiary principles. For example, it is well-settled that a trier of fact may draw an unfavorable inference against a party who lies in court. *See*, *e.g.*, 3 Edward J. Devitt, Charles B. Blackmar & Michael A. Wolff, *Federal Jury Practice and Instructions* § 73.04, at 55 (4th ed. 1987) ("If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.")

A similar rule provides that unfavorable inferences may be drawn against a party who destroys evidence in its control or fails to produce a witness in its control. *See*, *e.g.*, 2 John H. Wigmore, *Evidence in Trials at Common Law* § 291, at 228 (1979) ("The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor . . . ."); 3 Devitt, Blackmar & Wolff, *supra* § 72.15, at 45 ("If a party fails to call a person who possesses knowledge about the facts in issue, and who is reasonably available to him, and who is not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called him and did not."); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939)

(failure of defendants to call witnesses within their control to contradict allegations of their unlawful conduct "is itself persuasive that their testimony, if given, would have been unfavorable . . . .")

Thus, common evidentiary practice does not justify the result urged by the "pretext-plus" courts -- that a defendant may lie and nonetheless prevail. If a defendant lies in a Title VII case, an inference of discrimination should be drawn against it. *See, e.g., Chipollini* v. *Spencer Gifts, Inc.*, 814 F.2d 893, 899 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987) ("A defendant which is less than honest in proffering its reasons for discharge risks an unnecessary . . . discrimination verdict."); *Valdez* v. *Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 634-35 (W.D. Tex. 1988) ("An employer cannot come forward with any reason justifying the job discharge, but must instead come forward with only legitimate reasons . . . . Once [p]laintiff has shown that [d]efendant's proffered reason is unworthy of belief, the case is over.")

It is equally clear that the defendant -- not the trier of fact -- must proffer the reason explaining the defendant's conduct. As the *Burdine* Court noted: "An articulation not admitted into evidence will not suffice." *Id.* at 255 n.9.

Lanphear v. *Prokop*, 703 F.2d 1311 (D.C. Cir. 1983) is directly on point. In *Lanphear*, plaintiff, a white male, filed a reverse discrimination suit after his employer rejected him for a position that was subsequently filled by an African-American male. After plaintiff established his *prima facie* case, the employer argued that plaintiff's "poor performance" was the reason for his rejection. *Id.* at 1316. The district court disregarded defendant's proffered reason and granted judgment for defendant on a completely different ground—that defendant "simply wanted 'to inject new blood . . .' by means of a 'change in personnel' . . . ." *Id.*

The D.C. Circuit reversed, noting that the reasons actually advanced by defendant for plaintiff's rejection had been "decisively refuted" by the evidence (*id.* at 1317), and also that the district court's explanation was unsupported by the evidence and by defendant itself:

> The entire basis for this "clean sweep" justification presented by the district court appears to stem from a stray suggestion. . . . There is no indication that this suggestion was followed. . . . More important, . . . *the selecting official, never offered it as a reason for not selecting [plaintiff]. Nor was it ever put forward as a justification by the [defendant], either before this court or below. In fact, the [defendant] has explicitly disavowed it.*

Id. at 1316 (emphasis supplied).

Moreover, the D.C. Circuit found that the district court erred in substituting its own explanation because under *McDonnell Douglas-Burdine* the defendant must proffer a reason in order to satisfy its burden of production and permit plaintiff a full and fair opportunity to rebut:

> The district court's substitution of a reason of its own devising for that proffered by [defendants] runs *directly counter* to the shifting allocation of burdens worked out by the Supreme Court in *McDonnell Douglas* and *Burdine*. The purpose of that allocation is to focus the issues and provide plaintiff with "a full and fair opportunity" to attack the defendant's purported justification. *That purpose is defeated if defendant is allowed to present a moving target or, as in this case, conceal the target altogether. . . .*
>
> . . .
>
> It should not be necessary to add that the *defendant cannot meet its burden by means of a justification articulated for the first time in the district court's opinion.*

Id. at 1316-17 (emphasis supplied). The ruling in *Lanphear* is particularly apt in the present case, where the district court also substituted its own unsupported reason -- "personal motivation" -- to explain petitioners' conduct.

There is nothing in *McDonnell Douglas* or *Burdine* to countenance an employer's masking the true reason for its decision

– in effect, perpetrating a fraud on the court – and then requiring a plaintiff who is not confronted with that reason to try to figure out what that reason might be and rebut it. The only fair and justifiable solution to the fear expressed by the "pretext-plus" courts is to require employer defendants to come forward with the actual factors that motivated their decisions, even if those factors are bad, embarrassing or unsavory, and to instruct triers of fact (who will increasingly be juries in light of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991)) that only discrimination is barred by Title VII.

B. The Approach Of The "Pretext-Plus" Courts Would Lead To An Administrative Quagmire In Discrimination Cases, And Runs Counter To The Principles Underlying Fed. R. Civ. P. 16

If the plaintiff's full and fair opportunity to prove pretext is to survive the onslaught of the "pretext-plus" approach, then Title VII trials cannot be turned into guessing games. Either Title VII plaintiffs must be permitted to prevail once they have proved defendants' proffered reasons are pretextual, or they must have an opportunity to establish, after notice, that an explanation proffered by the trier of fact is as "unworthy of credence" as the employer's explanation proved to be. *See, e.g., IMPACT* v. *Firestone*, 893 F.2d 1189, 1194 and n.5 (11th Cir.), *cert. denied*, 498 U.S. 847 (1990) (plaintiff must be provided "a fair opportunity to cross-examine the defendant's witnesses as to the actual reason which is testified to.")

The latter alternative would seem to require some sort of bifurcated trial. One possible scenario: the trier of fact would need to render an interim verdict after the *McDonnell Douglas-Burdine* proof goes in. If it ruled that the defendant's articulated explanations were pretextual, the trier of fact would need to identify any other explanations that, in its opinion, could account for the challenged employment decision. In jury cases, this would necessitate jury interrogatories; in bench trials, the court would have to issue some sort of advisory opinion. The plaintiff would then have to be given an opportunity – perhaps even after additional discovery – to rebut the explanations identified by the trier of fact. Without such a procedure, the plaintiff would never have the full and fair

opportunity to prevail that was guaranteed by this Court in *McDonnell Douglas* and its progeny.

Merely setting forth the order of proof necessary under such a system demonstrates how alien it is to our rule of jurisprudence and how cumbersome it would be for the courts to administer. The whole purpose of the Federal Rules of Civil Procedure and local court rules concerning the conduct of litigation is to *narrow* and *focus* the issues in a civil case prior to trial. As this Court ruled in *Burdine*, that same goal of narrowing and focusing the issues is the reason the defendant is required to produce a legitimate, nondiscriminatory explanation for its conduct. *See Burdine*, 450 U.S. at 255 n.8 ("the allocation of burdens . . . is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.") It hardly serves that goal to construct an evidentiary framework that permits a defendant to prevail on the basis of an argument it has never made, and perhaps even abjures.

All of the protections of federal trial procedure would be undermined by a system that permitted rebuttable issues to be advanced *after* the case was closed. Obviously, a plaintiff has no reason to pursue discovery into a non-issue – in this case, where Captain Powell denied that he had any difficulties with Hicks and defendants did not advance personal animosity as their motive, Hicks had no incentive to inquire more deeply into the "issue" that would later prove dispositive to the district court. Moreover, parties are routinely limited to proving the matters specified in their court-approved pre-trial orders, which control the subsequent course of a litigation and which a district court has no obligation to modify once entered. *See* Fed. R. Civ. P. 16(e); *Daniels* v. *Board of Education*, 805 F.2d 203, 210 (6th Cir. 1986); *Roland M.* v. *Concord School Comm.*, 910 F.2d 983, 999 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991). All of these procedural rules will have to be revised if a plaintiff is to retain a full and fair opportunity to prevail on the basis of indirect evidence even as the *McDonnell Douglas-Burdine* framework is eviscerated by a "pretext-plus" approach.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

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NO. 92-602

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER
and STEVEN LONG,

Petitioners,

v.

MELVIN HICKS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The National Employment Lawyers Association respectfully submits this brief amicus curiae in support of Respondent in this case. The written consents of all parties have been filed with the Clerk of this Court.

I. INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a nationwide bar association of over 1500 lawyers who represent individual employees. Founded in 1985 and headquartered in San Francisco, NELA members comprise a large segment of the leaders of the bar specializing in employment discrimination on behalf of employees. NELA members regularly handle cases of discrimination.

In light of its interest in the application of employment law, NELA has filed several amicus briefs in this Court as well as briefs before the Circuit Courts of Appeals and various State Supreme Courts.

Because of its practical experience with the issues at bar, NELA is well suited to brief this Court on the importance of the issues and

the practical effects of the Court's decision beyond the immediate concerns of the parties.

II. SUMMARY OF THE ARGUMENT

Employer petitioners and their supporting amici seek to undermine the longstanding burden of proof analytic framework established for the disposition of employment discrimination cases. NELA respectfully suggests that the extant burden of proof scheme established by this Court is well grounded in law, fair in application and sound as a matter of public policy. It presents no undue burden on truthful defendant employers nor does it create an undue burden on the judicial system. The Eighth Circuit followed such burden of proof framework in this disparate treatment racial discrimination case; no legal or policy basis exists for reversal herein.

Further, changes suggested by petitioners in the burden of proof scheme would allow lower

court judges to substitute hypothetical conjecture or their own business judgment for the articulated reasons actually proffered by defendant employers. The district court's decision also violates the holding of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) providing that plaintiffs be afforded a fair opportunity to demonstrate pretext.

Lastly, although progress has been made in the elimination of discrimination, individuals seeking to employ the disparate treatment model, particularly moderate income complainants, continue to have difficulty obtaining legal representation and prosecuting their claims. Change in the shifting burden of proof scheme would undercut the ability of plaintiffs to utilize circumstantial evidence and would decrease the ability of employees to obtain legal representation.

III. ARGUMENT

1. Most Disparate Treatment Plaintiffs Rely Upon the Three Stage McDonnell Douglas-Burdine Analysis to Establish Employment Discrimination:

A disparate treatment plaintiff can prove discrimination either by direct evidence of discrimination or by use of the shifting burden of proof scheme. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Discrimination, however, is an elusive entity, involving intent of the alleged discriminating official. As this Court noted in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716-717 (1963):

> The law often obliges finders of fact to inquire into a person's state of mind.... It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else."

> Id. at 716-717 (quoting Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (1885).

In proving such state of mind or discriminatory intent, this Court noted in Aikens that direct evidence of employment discrimination is difficult if not impossible to obtain. Thus, as noted in Aikens, 460 U.S. at 716: "There will seldom be 'eyewitness' testimony to the employer's mental processes." In other words, few employers leave behind the veritable "smoking gun."[1]

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[1] See also Reeder-Baker v. Lincoln Nat. Corp., 834 F.2d 1373, 1377 n.9 (7th Cir. 1987) ("Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses ... will always be possible and often plausible."); Thornbrough v. Columbus and Greenville Railroad Co., 760 F.2d 633, 638 (5th Cir. 1985) ("Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree .... Employers are rarely so cooperative as to include a notation in the personnel file, 'fired because of age....'"); Dister v. Continental

Accordingly, the vast majority of disparate treatment plaintiffs must rely upon the three part McDonnell Douglas - Burdine analysis. Under such analysis, a presumption of discrimination is established once an employee establishes a prima facie case of discrimination. Burdine, 450 U.S. at 253-54. Should the defendant choose not to articulate a reason for its actions, the presumption goes unrebutted and the plaintiff establishes his case. As the Court noted in Burdine, 450 U.S. at 254:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Group, Inc., 859 F.2d 1108, 1112 (2d Cir. 1988) ("Direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it.")

See also Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), citing Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977), wherein this Court noted that a defendant whose acts are unexplained will be presumed to have discriminated because "these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."

Should the defendant so choose, it may rebut the presumption by the articulation of legitimate, nondiscriminatory reason or reasons for the adverse action. Burdine, 450 U.S. at 254-55. The reasons to be proffered through the introduction of admissible evidence, however, are "the reasons for the plaintiff's rejection" Burdine, 450 U.S. at 255, rather than some after-articulated but plausible reasons that could have been - but were not - the reason for the action taken. Burdine further cautions that:

"An articulation not admitted into evidence will not suffice." Id., 450 U.S. at 255 n.9.

Once the Defendant having introduces its asserted reasons, the plaintiff must then prove that the proffered reasons were not the true reasons but rather were merely a pretext for discrimination. Burdine, 450 U.S. at 253. This three part analytic framework, unanimously adopted by this Court in McDonnell Douglas, and unanimously reaffirmed by this Court in Burdine, has long been accepted and is remarkably successful in sifting through factually intensive cases to discern the real reason for the defendant's adverse action.

2. If Plaintiff Carries his Ultimate Burden of Proof that the Defendant's Articulated Reasons are Pretextual, the Initial Presumption of Discrimination Stands Unrebutted and Plaintiff Prevails.

Employees do not have direct access to the employer's decision making. Accordingly,

plaintiffs most often present their case by circumstantial evidence.[2]

Hicks presented circumstantial evidence of discrimination; it established an illegitimate racially motivating reason for the actions of the defendants. Especially critical evidence herein is petitioner employer's "percentages and numbers" memorandum which sought to "balance" the numbers of whites to blacks in the supervisory workforce. Hicks introduced that study in which petitioner's agent analyzed each supervisory position by race. The study concluded that white employees at St. Mary's "control only 38.62% (8.11 divided by 21) of the

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[2] As noted in Aikens, 460 U.S. 711, 714 n.3 (1983): "As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves ... [T]he District Court should not have required [plaintiff] to submit direct evidence of discriminatory intent."

decision making power." The study then made suggestions to increase the number of whites so that they would control "55.29% of the power." (Joint Appendix 81-85).[3]

Plaintiff further showed that after issuance of this memorandum, four black supervisors and no white supervisors were discharged at St. Mary's. All four black supervisors were replaced by white supervisors. Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1246 (E.D. Mo. 1991). Hicks also presented evidence of actions evidencing animus[4] and

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[3] Defendants' decision makers self-servingly disclaimed knowledge of this "smoking gun" study. However, an employer can not create a racial "numbers and percentages" memorandum, set about to achieve the goals of that memorandum by discharging black supervisors and replacing them with white supervisors and then, when challenged, "stick its head in the sand" and disclaim knowledge.

[4] After demotion, Powell, the white Chief of Custody, followed plaintiff outside, stepping on his heels and provoking him to fight. Hicks testified:

> So, I asked him, I said, "Hey, you're a man and I am a man. Hey, you don't have to treat me like that, you know, treat me like a man."
> Just like that.
> And he kept looking at me, laughing in my face.
> So I asked him, "What are you trying to do, provoke me and make me fight you?"
> And he said yes. (Joint Appendix 22-24).

disparate treatment between plaintiff and comparator employees[5] as he is entitled to do. As noted in Teamsters v. United States, 431 U.S. at 335 n.15, "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."

As this Court noted in Burdine, 450 U.S.

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[5] Hicks, a black supervisor, was disciplined not for his own infractions but for those of his subordinates; Hefele, a white supervisor, was not so disciplined. Further, white employees Newland, Doss, Ratliff and Slinkard were either not disciplined or disciplined less severely for infractions as or more serious than those of Plaintiff's subordinates. Hicks v. St. Mary's, 756 F. Supp. at 1246-49.

248, 255 n.10: "[T]here may be some cases where the plaintiff's initial evidence combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." This is just such a case.[6]

In the instant case, the defendants articulated two reasons for the demotion and discharge of Hicks: the severity and accumulation of violations committed by Hicks. Through effective cross-examination of the decision maker and reliance upon plaintiff's

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[6] Thus, based on the totality of the evidence, this case can not be characterized as a "pretext only" case, e.g. a case where the sole reason for finding discrimination is the discrediting of the Defendant's reason for discharge. It is more akin to the "pretext plus" case presenting a multitude of circumstantial evidence. Such labels may present a false dichotomy, however, as each case must be determined at trial on its particular facts. In a "pretext only" case, the credibility, vel non, of the decision maker often sways the factfinder. See Tye v. Board of Education, 811 F.2d 315, 318-320 (6th Cir.) cert. denied, 484 U.S. 924 (1987).

testimony and evidence, Hicks discredited - or established as pretext - the defendants' asserted reasons for their action. The district court, Hicks v. St. Mary's, 756 F. Supp. at 1251, affirmed by the circuit court, found that Hicks proved that the reasons proffered by defendants were pretextual.

Once plaintiff proves that the asserted reasons for the discriminatory action are not the true reasons - in other words once he proves such reasons pretextual - such discredited reasons (now little more than rationales) drop from the case.[7] Defendant then is left in no greater stead than had he not presented a

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[7] See Tye v. Board of Education, 811 F.2d at 318-320 (Reversal of lower court's dismissal on grounds that defendant had given "evasive and contradictory testimony," had admitted that the articulated reasons were "reconstructed" for the litigation, and that, in actuality, had had no reason for his decision.)

defense at all.[8]

Plaintiff's prima facie case thus standing effectively unrebutted, the presumption of discrimination stands and plaintiff prevails as a matter of law. Thornbrough v. Columbus and Greenville Railroad Co., 760 F.2d 633, 639 (5th Cir. 1985):

> By disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reason for the employer's decision, we presume that the employer was motivated by discriminatory reasons.

See also, Bishopp v. District of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986):

> Defendant's explanation for its decision was unworthy of credence as a matter of law. Such a blatantly

[8] Because the plaintiff retains the burden of proof of the issue of pretext, such analysis does not unfairly convert the defendant's burden of presentation to a burden of persuasion.

> pretextual defense carries the seeds of its own destruction. That is, it does not even satisfy the defendant's "intermediate burden" of producing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."

Policy as well as legal reasoning supports such a conclusion. To otherwise accord the defendant, whose pretextual reasons did not withstand scrutiny, a greater legal footing than that accorded the defendant who, by truthfully standing mute before the court, faced a presumption of discrimination, would place a wholesale premium on dishonest defendant ingenuity at the expense of the tribunal.

3. The Decision of the District Court to Choose a Reason for Discharge Not Articulated by the Defendant is Contrary to McDonnell Douglas and Clearly Erroneous:

Once the defendant's articulated reasons are discredited by the factfinder, only two

choices remain: credit the plaintiff's reasons or roam outside the record to find yet a third reason not articulated by defendant. In the instant case, rather than granting judgment for the plaintiff, the district court engaged in the clearly erroneous conduct of straying from the articulated reasons of the petitioners evidenced on the record and finding yet a third secret reason - alleged "personal" motivation - that "could have" motivated the defendant. Hicks v. St. Mary's, 756 F. Supp. at 1251-52.

In the instant case, at no time did the defendants assert - nor did the record evidence establish - that Chief of Custody Powell had claimed a personality conflict or personally motivated difficulties with the plaintiff.[9]

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[9] Thus, Supervisor Powell denied on cross examination that there were "difficulties" between himself and plaintiff, stating: "I can't say that there was difficulties between he and I At no time was there any kind of personal - (sic)" (Joint Appendix 46).

Indeed, the sole evidence cited by petitioners in their attempt to buttress the lower court's substitution of his own conjecture for the defendants' articulated reasons is the plaintiff's testimony that his white supervisor admitted that he wanted to pick a fight with plaintiff. When a white supervisor admits to a black subordinate that he wants to pick a fight and deliberately attempts to provoke that fight, and the record establishes no other motivating rationale for the white supervisor's actions, that incident constitutes circumstantial evidence of race discrimination rather than some secret reason of "personal" motivation plucked from the air by the lower court judge.[10]

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[10] See Pettit v. Sears, Roebuck & Co., 32 Fair Emp. Prac. Cases (BNA) 1867 (D.C. Kan. 1983) ("Unexplained, unfair treatment meted out to a black man carries an inference of racial discrimination with it."); C.f. Smith v. Board

It is not the provence of the tribunal in a pretext discrimination case to scour the record - as Judge Limbaugh apparently did here - to determine if there may possibly be an unarticulated reason to support discharge. Since few employees of long standing have a perfect record, there often can be found such plausible non-discriminatory reasons. Rather, it is the job of the factfinder to attempt to determine the actual mindset of the alleged discriminating official at the time of the adverse action - to determine what actually did transpire as contrasted to speculation as to what could have or should have transpired.

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of Education, 365 F.2d 770 (8th Cir. 1966) (decision of then Judge Powell) ("However, in this day race per se is an impermissible criterion for judging either an applicant's qualifications or the district's needs. And this applies equally to considerations ... when these descriptions amount only to euphemistic references to actual or assumed racial distinctions.)

So too, interjection of unarticulated rationales fundamentally shifts the factual inquiry, distracting the tribunal into the irrelevant inquiry as to whether an employer can now find a legitimate reason for discharge, even if that reason is found only in the course of litigation long after the discharge.

Pretext analysis assists in the determination of actual occurrences by allowing the factfinder to assess all of the evidence proffered by the defendant and all of the evidence and arguments of plaintiff to rebut such reasons or rationales. Should the defendant proffer two reasons but hold a third "up its sleeve" only to be presented if necessary, or should the factfinder substitute such third reason at the close of the trial, then the three part analytic framework must necessarily fail. In that instance, the

plaintiff employee then has been deprived of the opportunity to rebut the asserted reasons for discharge. Accordingly, no analysis of pretext can be applied.

Moreover, allowing the factfinder to stray from the record to find "hypothetical" reasons imposes a fundamentally unfair burden on the plaintiff. The plaintiff is effectively denied the opportunity to present evidence to rebut the non-disclosed, assertedly "true" reason for discharge. Such action flies in the face of the teaching of McDonnell Douglas which holds that plaintiff "must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to reemploy was a pretext or discriminatory in its application." Id. 411 U.S. at 807.

Had the defendants presented the asserted third reason at trial, Hicks could have further

developed the record to establish the lack of "personal" motivation for animosity. Plaintiff could have also introduced expert witness evidence to establish the types or effects of racial stereotyping behavior, similar to the expert testimony introduced by the plaintiff in Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36 (1989).

While untruthful defendants rightfully bear the risk of an adverse judgment if plaintiff establishes pretext, this differs in no manner from any other civil suit in which the party who lies loses the suit. Moreover, truthful defendant employers are not victimized by the three part analytic framework, for it is well recognized by the federal judiciary that an employer can fire an employee for a good reason or a bad reason, so long as the reason is not a discriminatory one. What the defendant must do

in a pretext analysis case, however, is present all its reasons to the tribunal or face the consequences that its unexplained conduct will subject it to a presumption of discrimination.

4. Racial Stereotypes or Antagonistic Behavior Can Mask Racial Discrimination:

Just as this Court found offensive stereotypical assertions concerning women, Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) this Court should also look with skepticism on the district court's assertion that a discharge of a black male first line supervisor by his white superior may be due to a "personally motivated" decision. Such finding is similar to a finding that the black subordinate has a "personality conflict" or an "attitude problem" and can often mask discriminatory intent. See Martin v. Thompson Tractor Company, 486 F.2d 510, 511 (5th Cir. 1973): "The trial court was not insensitive to the danger of accepting a

general term such as 'poor attitude' as adequate grounds for a discharge, if any racial overtones were present in the relationship between the parties." The Fifth Circuit noted that the district court carefully recognized that:

> The question that really becomes a very tough one for the court stems from the fact that the words 'attitude,' 'good attitude,' or 'bad attitude,' or 'lack of cooperation' can very easily be the label to cover and conceal racially motivated prejudices and discriminations, in fact, under some other title that looks acceptable.

Courts have found black males to have been painted with stereotypical labels that mask discriminatory intent. Thus, the black male plaintiff in Bibbs v. Block, 778 F.2d 1318, 1320 (8th Cir. 1985) (en banc) was characterized as a "black militant." Another black applicant was found to be "a little on the smart aleck side." Wilson v. City of Aliceville, 779 F.2d 631, 633 (11th Cir. 1986).

5. **Black Males Remain Victims of Employment Discrimination:**

Black men remain "unchallenged for last place in every important demographic statistic."[11] Persistent evidence of societal racial discrimination exists. Black men are disproportinately unemployed, having an unemployment rate of 12.2% compared with 11.5% for black women, 4.4% for white men and 4.9% for white women.[12]

Further, black men disproportionately are found in low-status labor occupations. Only 14% of working black men are employed in managerial and professional jobs, as compared

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[11] Note, Invisible Man: Black and Male Under Title VII, 104 HARVARD LAW REVIEW 749 (1991) quoting Douglas Glascoe, Dean of Howard University quoted in Welsh, Young, Black, Male and Trapped, Wash. Post, Sept. 24, 1989.

[12] Note, supra, at 752, citing U.S. Dep't of Labor, Employment and Earnings 19 (Aug. 1990).

with 18.2% of working black woman, 26.4% of white men and 26.5% of white women.[13]

Commentators also note the difficulty faced by the black male such as plaintiff Hicks who attains a supervisory position of authority over subordinate white employees.[14] Indeed, this record shows evidence of such conflict. Thus, the lower court noted that Tunney, a white subordinate, cursed Hicks, his black supervisor, with highly profane language. Hicks requested that Tunney be disciplined but Hick's white superior denied the request.

6. **Access to Legal System Continues to Remain Restricted for Plaintiffs:**

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[13] Id. at 753, citing U.S. Dep't of Labor, Employment and Earnings 19 (Aug. 1990).

[14] Note, Invisible Man: Black and Male Under Title VII, 104 HARVARD LAW REVIEW at 756-759 (1991); R. Farley & W. Allen, The Color Line and Quality of Life in America, 257, 281, 287; T. Kochman, Black and White Styles in Conflict 7-15, 74-88 (1981).

Access to the legal system for alleged victims of employment discrimination continues to remain limited. In many cases, the actions of the defendant - particularly discharge - renders the putative plaintiff financially encumbered and resourceless.

Although the EEOC has extensively litigated employment discrimination cases, and while its litigation efforts have been responsible for many of the larger class action victories, its ability to litigate many of the single discharge cases has necessarily been restricted by budgetary and personnel constraints.

Plaintiffs have the right to bring their own lawsuit. However, few discharged complainants have the financial resources to pay for legal services - especially if the skirmish turns into a nine year war such as in the instant case. Such putative plaintiffs are often

dependent upon attorneys able to accept their cases on contingency. However, attorneys with experience in employment discrimination able to undertake such litigation are increasingly rare. As a practical matter, those attorneys that do agree to representation of the near resourceless plaintiff screen their cases rigorously and can take only a limited few.

Thus, the "pretext only" case - not present herein - where there is no other circumstantial evidence of discrimination except the asserted pretextual nature of the defendant's reason for discharge is a statistical rarity.[15] Far more frequent is the case of the putative plaintiff with "pretext plus" evidence of discrimination

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[15] How truly rare "pretext only" cases are can be seen by contrasting the limited handful of such cases with the number of EEOC charge filings - 945,000 in nine years. See Perceptions and Research on the Effectiveness of the EEOC 43 Lab. L. J. 249, 254 (1992).

who simply can not afford an attorney nor find one willing to undertake the long legal battle on a contingent fee basis.[16] The inability to find counsel is especially true with respect to complainants of low and moderate income, because the backpay damages are likely to be low.

7. **Reduction of Case Backlog Should Be Accomplished By Increased Use of Alternative Dispute Resolution (ADR) and Other Settlement Techniques Rather Than By Summary Judgment Which is Rarely Appropriate in Cases Alleging Discriminatory Intent:**

In the twenty nine years since the enactment of Title VII, discrimination cases have unfortunately remained a federal mainstay.

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[16] Thus, in a 1991 survey and report conducted by NELA entitled "Unprotected Rights: The Increasing Barriers Preventing Victims of Employment Discrimination From Obtaining Legal Representation," NELA found that complainants have difficulty finding a lawyer. The survey found that almost two thirds (61%) of the lawyers surveyed stated that they reject 80% or more of requests for employee representation; forty-four percent (44%) decline to represent more than 90% of the employees seeking help.

However, attempts at a reduction of the case backlog by tinkering with the established burden of proof scheme or by summary judgment disposition will undoubtedly fail for the factual inquiry in a pretext disparate treatment case remains the determination of the intent of the defendant at the time of the alleged discriminatory action. Such inquiry, dependent largely upon the credibility of the parties, is not readily disposed of by summary disposition. See, for example, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir.)(en banc), cert. dismissed, 483 U.S. 1052 (1987).

Reduction of case backlog can best be achieved by increased use of alternative dispute resolution mechanisms, (ADR), particularly the increased use of mediation. It has now taken Hicks close to nine years to litigate his discharge. It is the rare plaintiff who would

relish such a protracted battle if a reasonable truce can be structured through the offices of a court appointed mediator seeking resolution at the early litigation stage.

III. CONCLUSION

Changes in early settlement procedures are well warranted; restricting plaintiff's access to the courts by the change in the well established burden of proof scheme is neither well founded in law or public policy. Accordingly, NELA respectfully seeks affirmance of the decision of the Eight Circuit herein.

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